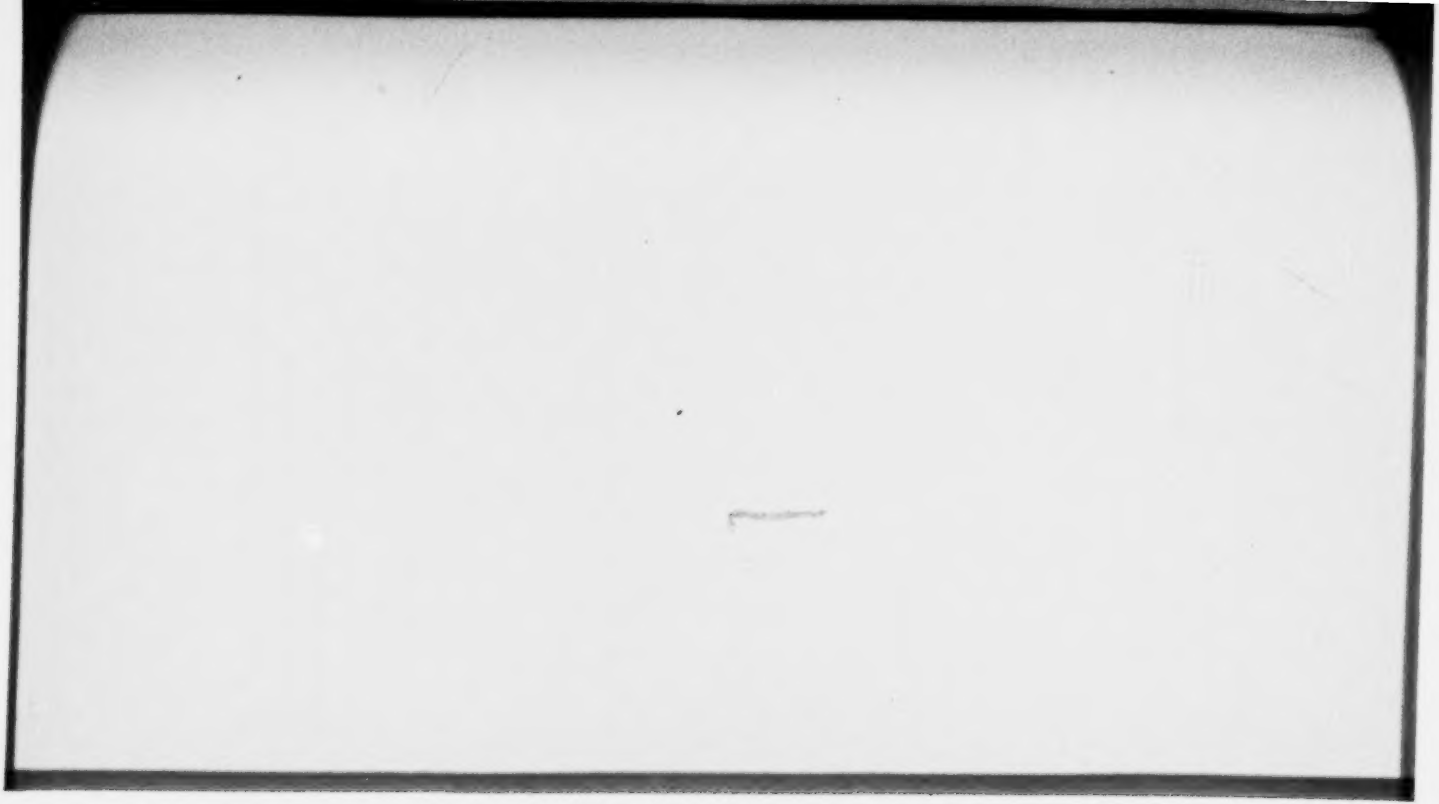

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In the Supreme Court of the United States

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JAMES H. McKENNEY,
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FIDELITY & DEPOSIT COMPANY OF MARYLAND, Petitioner,

vs.

L. BUCKI & SON LUMBER COMPANY, Plaintiff in Circuit Court.

No. 220.
October Term
1902.

Brief of the L. Bucki & Son Lumber Company on its Own Assignments of Error, and on those assigned by the Petitioner.

H. BISBEE,
GEORGE C. BEDELL,
Of Counsel for L. Bucki & Son Lumber Co.

25705

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STATEMENT.

This is an action at law upon two attachment bonds. The business relations existing between The Atlantic Lumber Company, the attaching creditor, and the L. Bucki & Son Lumber Company, the Plaintiff in the Circuit Court, and which will be called the plaintiff here, were those of vendor and vendee, of hard pine logs; and the plaintiff was a manufacturer of hard pine lumber.

On the 1st day of October, A. D. 1897, The Atlantic Lumber Company commenced an action at law against the Plaintiff in Error, to recover an alleged balance of $8,609.78, on account of the contract price of pine logs sold and delivered by it to the said plaintiff, and on said day caused a writ of attachment to be issued for $9,980.80.

and levied upon the lumber of the Plaintiff to the amount of about 1,250,000 feet. The petitioner was a surety upon the bond required by the Statutes of Florida to be filed before such writ of attachment could issue. Said action was commenced in, and said writ issued from, the Circuit Court of Duval County, State of Florida, and was duly removed into the Court below. Such proceedings were had therein that, on motion of said plaintiff, defendant in the attachment proceeding, the writ of attachment was dissolved on the face of the papers, and on issues of law, on the 1st day of November, 1897.

On the eleventh day of October, aforesaid plaintiff delivered to the Sheriff of Duval County, Florida, a forthcoming bond for such lumber, in accordance with Section 1652 of the Revised Statutes of Florida, and thereby the plaintiff acquired possession of such lumber as *bailee* of the said sheriff. (Rec. 72.)

On October 1st, aforesaid, the said The Atlantic Lumber Company commenced another action at law against plaintiff, to recover a large amount of unliquidated damages claimed for an alleged breach of the contract under which said company was delivering pine logs to plaintiff, and in that action, on the same day, caused a writ of attachment to be issued for $75,000, and levied upon 3,500,000 feet of timber and lumber and 3,000,000 feet of logs in boom; all of plaintiff's saw-mill plant; planing mills and dry kiln plants, for a more particular description of all of which properties levied on under said writs reference is here made to the return of the sheriff on said writs. (Rec. pp 55, 56.)

The said action was commenced in, and the said writ issued from, the Circuit Court of Duval County, Florida, and was duly removed into the Court below. The petitioner, hereafter called the defendant, was surety on

the bond required by said statute before such attachment could issue.

On the 4th day of November, 1897, plaintiff delivered to the sheriff a forthcoming bond in accordance with said section of the Revised Statutes of Florida, and thereby acquired the possession as *bailee* for the sheriff of all the personal property levied on under the said writ.

Such proceedings were had in said action that, on motion of the said plaintiff on issues of fact, tried by the Court, by consent of parties waiving a jury, the said writ of attachment was, on the 14th day of February, 1898, dissolved by the judgment of said Court, and the property ordered to be delivered to plaintiff.

That thereupon The Atlantic Lumber Company sued out a writ of error from the Court of Appeals to review said judgment, and gave a bond, which operated as a supersedeas in point of fact and preserved the lien of said attachment. And in said action a final judgment on the merits was rendered against the said Atlantic Lumber Company on the 7th day of May, A. D. 1898; and the said Company sued out a writ of error from the Court of Appeals to review said judgment gave a bond, which together with a special order of said Circuit Court operated in point of fact as a supersedeas, and thereby preserved and continued the lien of the said writ of attachment upon all the properties so levied upon.

On the 3d day of January, 1899, the Court of Appeals dismissed the writ of error to review the judgment dissolving said attachment, on the ground that it was issued in a suit still pending on the merits and was not a final judgment, and on the same day this Court affirmed said judgment upon the merits, whereupon the said Atlantic Lumber Company applied for a rehearing, which was denied. Said Company then moved to reverse said judgment, with directions to remand said action to the State Court, on the pretense that the Federal Court had no jurisdiction, which motion was denied.

Thereupon The Atlantic Lumber Company applied to the Supreme Court for a writ of certiorari, which was denied about the last of May, 1899. (Rec. p.70.)

On the 9th day of October, 1897, the plaintiff delivered an indemnity bond to said sheriff, for the purpose of enabling plaintiff to deliver certain lumber to vessels, to indemnify such sheriff against any loss; which bond was accepted for such purpose.

On the 9th day of October, 1897, the plaintiff delivered an indemnity bond to said sheriff, for the purpose of enabling the plaintiff to deliver certain lumber to vessels, to indemnify the sheriff against any loss. (See said bonds, Rec. pp. 73-74.)

All of the said forthcoming bonds and indemnity bonds were given voluntarily, there being no statute of Florida making it the duty of plaintiff to give any such bonds.

The defendant was also surety upon another forthcoming bond, which was in the penal sum of one hundred thousand dollars; and in order to obtain the defendant as surety upon such bond, the plaintiff was obliged to execute, and did execute, and deliver to the defendant as such security, a mortgage upon all its timber, lumber and logs, aggregating over eight million feet, and upon its said mill plants and real estate on which it was located, boom-pens, docks and wharves, conditioned to save the said surety company harmless, and to be cancelled in the event and when said attachment should be finally discharged, and the lien cease to exist. Said mortgage was given on the same day as the said bond. (Rec. p. 74.)

By reason of the said writ of error and application for said writ of certiorari, the said surety company would not consent or agree that the lien of said attachment was

finally dissolved, and would not release and cancel the said mortgage until the early part of June, A. D., 1898. (See the release, Rec. p. 78.)

So that the lien of the said attachment and the said mortgage caused by said attachment remained as an encumbrance upon practically all the properties and assets of the plaintiff until such release was delivered to plaintiff, which was on the 8th day of June, A. D. 1899. (See release, Rec. p. 78, executed in Baltimore, Md.)

On the 11th of October, 1897, ten days after said writs were levied, plaintiff obtained the consent of the sheriff in connection with such indemnity bonds, to allow the plaintiff to operate its saw-mill, and to saw up the three million feet of logs in the boom; *the lien of such attachment to be transferred and levied upon the product of such logs as fast as sawed.*

This was for the purpose of keeping in plaintiff's employ its usual corps of laborers, and to give employment to employees employed by the year, and to have the product of such logs ready for sale and delivery when such attachment lien should cease to exist. Accordingly, said mill was started up and was operated until about the 16th of November, 1897, about six weeks, when all said logs had been cut into timber and lumber, amounting to about three million six hundred thousand feet.

Each of the above writs of attachments was ancillary to a common law action, begun contemporaneously with the issue of such writs. The attachments were dissolved, leaving the common law suits still pending. At the time of issuing these writs, October 1st, 1897, the attaching creditor, The Atlantic Lumber Company, was under contract as vendor, whereby it was bound to deliver every month into the plaintiff's boom, 2,000,000 feet of pine logs, board measure—this being about the total

capacity of plaintiff's plant. Said contract had, on October 1st, aforesaid, *three and a half years* to run; and contemporaneously with these writs, said attaching creditor and vendor refused to deliver any more logs, and did not deliver any after September 30th, 1897.

After the removal of said common law actions into the Federal Court, they were, on motion of defendant therein consolidated, and afterwards tried on their merits in one trial, by the same jury.

Prior to such consolidation, declarations had been filed in each action, and in the action called No. 1 in which the writ of attachment for $9,980.80 was isued, the declaration claimed only a balance on account of log deliveries of $8,609.78. After such consolidation the plaintiff therein abandoned both of said declarations and filed a new one, containing *twelve counts.*

The 8th and 9th counts in such new declaration embraced *two small claims*, amounting to about $1,800, arising out of transactions *other than log deliveries*, on which, on October 4th, 1897, said plaintiff had brought a *third action* , and caused *a third writ* of attachment to issue therein. This third suit was abandoned, and the claims were declared on in said 8th and 9th counts.

The claim set up in the suit No. 2 before consolidation, in which the writ of attachment for $75,000 issued, was based, originally, on the pretext that defendant (the plaintiff in this action on the bond) had breached the said log contract, and that the plaintiff in that action —the vendor— *would have made a profit of* $75,000 *if it had performed the contract for the remaining three and a half years,* by delivering logs for that period. This was set up in counts 3, 4, 5, 6, 7 and 10.

After such consolidation, the plaintiff therein set up a new claim that the inspector of the logs, mutually chosen by the vendor and the vendee, had cheated the vendor

out of a large sum of money, by not measuring correctly the logs delivered during the four and a half prior years. This claim was set up in counts 11 and 12. The 11th count went out on demurrer.

At the trial by a jury on the merits, the defendant (plaintiff here) *recovered a verdict and judgment* on counts 3, 4, 5, 6, 7, 10 and 12, setting up claims for such alleged lost profits, for which the $75,000 attachment issued. On counts 1 and 2, embracing all the common counts, and counts 8 and 9 aforesaid, the plaintiff therein recovered a general verdict and judgment for something over $8,000. [This was $4,000 more than the plaintiff was entitled to,on account of errors of fact and miscalculations of the trial judge, committed in calculating the amount due on pleas of set-off (which the trial judge erroneously refused to submit to the jury), and which error such judge undertook to correct, on a motion for a new trial, by ordering a remittitur. The Court of Appeals, at its last term, on a bill in equity to correct such miscalculations of the trial judge, sustained the bill and adjudicated and ruled that the present plaintiff was entitled to a credit of the $4,000 on the said judgment for over $8,000.] So that the writ of attachment for $75,000 was not only dissolved on the merits, and the writ for $9,980.80 was not only dissolved, but it has been adjudicated that, after adding said 8th and 9th counts, setting up claims for $1,800 which was not any part of the basis of the attachment for $9,980.80, and on which a *third attachment* had been issued, the plaintiff therein was entitled to a judgment for only about $4,000.

The above is a brief but correct history of the common law actions and writs of attachment by the attaching creditor, which resulted in the *utter destruction of the plaintiff's prosperous business, in which, for several years prior to such attachments it had manufactured and sold about* 30,000,000 *feet of lumber per annum.*

PRESENT ACTION

This action was brought on the said attachment bonds on the 25th day of March, 1898, to recover "*all costs and damages sustained by the defendant (plaintiff here) in consequence of the improperly suing out of said writs of attachment*," according to the condition of such bonds and of the statute requiring them. *It was brought in the State Court and removed to the Court below by defendant.* (See Rev. Stat., Sec. 1646.)

By an act passed in 1897, a bond by a surety company is sufficient.

The declaration consists of two counts; each, respectively, sets forth *verbatim* the affidavit upon which the writ was issued, the bond, the writ, a description of the property levied on; alleges that for several years prior to and on the day said writs were levied, plaintiff had been engaged in doing a prosperous business of manufacturing and selling hard pine timber and lumber; that the daily product of its mill was about *one hundred thousand feet;* the interruption, suspension and destruction of its business and credit in consequence of such attachments, costs and attorney's fees, and expenses incurred in preparing for, and on the trial of the motions to dissolve the said attachments, and other damages, and that the damages sustained had not been paid.

PLEAS.

Defendant filed numerous pleas, all of which went out on demurrer, except the plea of *non-damnificatus*, and the issues raised by such plea were the only issues of fact tried by the jury.

MOTION TO STRIKE.

The Court below, on motion of defendant, by its order, struck out from each count of the declaration certain parts thereof, claiming damages for injury to credit and attorneys' fees incurred in consequence of such writs. But on plaintiff's motion afterwards restored such parts of the declaration. (Rec. pp. 19-22; 24-25.)

The Court also struck out from both counts certain words which it refused to restore. (Rec. p. 26. See order of Court, Rec. p. 31.)

VERDICT AND JUDGMENT.

The jury found a general verdict for plaintiff for ten thousand eight hundred and eighty dollars ($10,880), and a special verdict, under instructions by the Court in the words and figures following, to wit:

United States Circuit Court, Southern District of Florida
L. Bucki & Son Lumber Company,
vs.
The Fidelity and Deposit Company,
of Maryland.

We, the jury, find for the plaintiff, and assess its actual damages, exclusive of attorneys' fees, at $10,880. And if the Court be of opinion that, as a matter of law, the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7,500, as a reasonable and just fee for the services proven.

Foreman, WM. MICKLER.

The Court refused to include in its judgment the amount so found for attorneys' fees, and rendered its judgment for the said sum of ten thousand eight hundred

and eighty dollars ($10,880), and to reverse the said judgment, writ of error was prosecuted by plaintiff.

BILL OF EXCEPTIONS.

The bill of exceptions contains so much of the attachment proceedings and pleadings on the merits in said actions as were deemed material to the issues in the action. It contains all the forthcoming and indemnity bonds; the mortgage given by plaintiff; the testimony adduced establishing that the plaintiff owned its said mill plants, costing from $135,000 to $150,000; and had on hand in its yards and on its wharves over eight million feet of manufactured timber, including that cut from the three million feet of logs levied on, the market price of which was not less than *sixty-five thousand dollars; that there was not a lien of any kind upon said plants or properties, or products of its mill; that no suit was pending against the plaintiff when the attachments were levied; and that only one piece of its matured commercial paper was outstanding, and a set-off was claimed to the greater part of that; that plaintiff was doing a prosperous business; that prices of the products of its mills had commenced to advance, and that all the products of its mills were actually sold, or there was an active market for them;* that it had never disposed of any of such product, or of any of its assets, except in the usual course of business; that the total amount of the actual claims The Atlantic Lumber Company asserted against plaintiff did not exceed about eight thousand dollars, against which plaintiff had large set-offs, and its demand even for this was unliquidated.

It was deemed necessary to set forth at some length in the bill of exceptions the testimony upon certain points, for the reason that the Court below refused to submit to the jury numerous questions of fact; and such testimony was essential to establish that there was ample evidence

to go to the jury upon all such questions, and that such refusal was not justified, because there was no evidence. For this reason, the bill of exceptions is not subject to criticism, which might otherwise be just. (Bill of Exceptions, pp. 55 to 136.)

The Court below refused to submit to the jury the question as to how much damages the plaintiff sustained by reason of losses by the interruption and destruction of its business, caused by the attachment, and its refusal was based on the *sole ground that the common law suits claiming large damages might have contributed to such losses if no attachments had been issued, and that the refusal of The Atlantic Lumber Company to deliver any more logs to plaintiff after September 30th, 1897, might also have contributed to such losses, by requiring plaintiff to furnish itself with logs from other sources; and that there was no way the jury could separate the losses or damages which such other alleged contributory causes may have produced.*

The refusal of the Court to submit such question to the jury, completely destroyed and emasculated the plaintiff's main cause of action, and leaves the plaintiff to bear all its losses, resulting from interruption of business, caused by the attachments, on the theory that such alleged contributory causes might have contributed to such losses. This action of the Court is assigned as error, and presents the leading and most important question for review by this Court.

The pages *in brackets*, referred to in this brief, are to the original pages of the Record in the Circuit Court of Appeals.

ARGUMENT.

ASSIGNMENTS OF ERROR.

We repeat all the assignments of error by the plaintiff *on its writ of error* from the Court of Appeals. We insist that the said Appelate Court erred in not ruling each one of said assignments well taken.

The above assignments are numbered 1 to 37, inclusive (Rec. pp. 28 to 45), a few of which will be discussed at length. The most important of these are the 1st, 24th, 30th, and 32d, and are based on *exceptions* taken to the action and proceedings of the trial judge, contained in the bill of exceptions preserved by the plaintiff, and are in the words and figures following, to wit:

"Now comes the defendant, by its attorneys, and *after all the testimony had been taken* by the plaintiff and defendant, moves the Court to exclude from the consideration of the jury the following testimony:

1. All testimony in regard to the profits that the plaintiff's mill had been making prior to October 1st, 1897, on the grounds following:

A. Because loss of profits on the operation of the mill are not a proper element of damages in this case.

B. Because the profits that the plaintiff may have made in the past, are not a proper criterion of what it would have earned in the future.

C. Because the said estimate of $75,000 a month, was stated by the witness who made it to have been based on the "cost of the logs, the cost of the manufacturing and the net result of the sales, the actual sales, deducting one from the other, and taking off the cost of selling," which is an unintelligibe statement, and because the wit-

ness that made it admitted in cross-examination that he did not know what the lumber on hand sold for.

D. Because even if such testimony tended to prove that plaintiff had lost profits by reason of the attachment, such loss would be speculative and too remote as a reason of damages in this case.

2. All the testimony relative to the cost of manufacturing lumber, and the supply of the timber
178 lands and logs, on the grounds following:

A. That such evidence is incompetent, and

B. That loss of profits by reason of the plaintiff's inability to operate its mill after November 16th, 1897, cannot be recovered in this suit, and

C. Because the plaintiff has adduced no testimony to show that it could have gone on with its business after November 16th, 1897, even though no attachment had been levied, and

D. Because the testimony demonstrates conclusively that the plaintiff could not have operated its mill at a profit, even though no attachment had been levied.

3. All testimony in regard to damage to credit and loss of profits as a consequence thereof.

A. Because the plaintiff had adduced no testimony to show that it had any credit prior to October 1st, 1897.

B. Because the plaintiff had not shown that it could have obtained a loan of the funds necessary to carry on its business, even though no attachment had been sued out against it.

C. Because the testimony of the plaintiff shows conclusively that the plaintiff had no credit on October 1st, 1897.

4. All testimony in regard to the salaries and loss of time of the salesmen Murfree and Cohen.

A. Because the evidence fails to show that the said

salesmen could have made any sales during the time the mill was shut down.

B. Because the evidence shows that all the lumber was sold and shipped prior to January 1st, 1898, the time at which the employment of said salesmen terminated.

D. Because the loss of the service of the employees did not result directly from the levy of the writ of attachment.

E. Because it was not shown that the mill would have run had no attachment been levied.

5. All testimony in regard to the salary and loss of time of the secretary, and the New York bookkeeper, on the same grounds lost above, except
174 the first and second, and because it was not shown that said employees were idle, or, if idle, what the value of their lost time was.

6. All the testimony in regard to the salary of the president of the mill, the superintendent and stenographer, and the planing mill superintendent.

A. Because the loss of the services of these officers, if loss there was, did not result directly from the levy of the writ of attachment, and are not proper elements of damages herein.

.B. Because there is no evidence to show that said employees were idle from October 1st to October 10th, 1897.

D. Because the mill manufactured the average monthly quantity of lumber in October, 1897, and it appears that the plaintiff got substantially the same amount of services out of these employees as in other months.

E. Because the mill finally shut down November 16th, 1897, within the year for which these employees were employed, and ten days later than it would have shut down, but for the shut down in October, 1897.

7. All evidence relative to the market price of lumber subsequent to the 6th of February, 1899, because on that day the ownership of the mill property passed out of the possession of the plaintiff.

175 And on consideration of the said motion, the said Court ruled thereon in writing in words and figures following, to wit:

This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced, *any damages arising from the consideration of injury to credit or loss of profits would be too remote uncertain and speculative*, it is therefore ordered that this motion be granted *as to the testimony relating to the cost of manufacturing lumber and the supply of timber lands; all testimony to the damage to credit, loss of profits and all evidence relative to the market prices of lumber subsequent to the attachment.* That in regard to the profits plaintiff's mill had been making prior to October 1st, 1897, be retained and considered *only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment and the motion be denied in all other respects.*

February 1st, 1900. JAMES W. LOCKE, Judge.

And the said trial judge expressed his oral opinion in the words and figures following, to wit:

"This order is made at this time only for the purpose of confining the argument to the jury upon these lines. I am fully satisfied in my own mind that damages from the loss of profits arising from the subsequent or *future business which might possibly have been carried on, is, under the evidence, too remote and speculative for the testimony to go to the jury.* Some Courts have held that every fact should go to the jury to be considered, but the

United States Courts have uniformly held that where the testimony is such that any reasonable man, or any reasonable Court, could view it in but one light, the Court may exclude it from the jury. In this matter I have admitted the testimony, but I fail to find that there is such evidence of damage from loss of future profits as should go to the jury. *If there was no combination*
176 *of circumstances other than the attachments; had a third party come in and levied an attachment and stopped the business and there had been no suspension save by the attachment, then there might have been such testimony as would prove a loss of profits; but in this case the particular circumstances, the suspension of the contract for the delivery of logs and the bringing of the two common law suits, so changed the circumstances that there is no certainty that there could have been any profits.*

"Every author of authority referred to, even by the plaintiff's attorney, says that there must be some certainty.

"Now the certainty of profits here depends upon this: It is claimed that on account of these attachments the plaintiff's credit was injured; that had it not been for the attachments, *money could have been borrowed*, timber land stumpage could have been procured, logs could have been procured profitably; if logs could have been procured *profitably*, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the Court cannot say that there is sufficient to justify the jury in finding, perhaps, large damages against the defendant in this case on account of loss of credit and profit from the levying of the attachments."

To which ruling the plaintiff, by its attorney, then and there and before the jury retired, excepted on the grounds:

1. Because the ruling of the Court invades the plaintiff's constitutional right to trial by jury as to the question whether plaintiff could have continued its business and in the usual course of business if these attachments had not been levied.

2. The theory of the declaration upon which the plaintiff proceeded in the trial of the cause was that the attachments interrupted the business of the
177 plaintiff and caused its interruption for a long period of time, and that the plaintiff was entitled to prove and submit to the jury the question as to the loss of the use of its mill properties in consequence of these attachments. That during the taking of the testimony the Court repeatedly sustained the theory of the plaintiff, and on the objection of the defendant overruled objections of the defendant that testimony was not admissible to prove the past profits of the plaintiff's properties prior to October 1st, 1897, as a basis upon which to estimate the profits the plaintiff lost after October 1st, 1897, as a consequence of these attachments. That the ruling of the Court by the said order and decision has now taken the plaintiff by surprise, for if the Court had excluded the testimony offered by the plaintiff, and by the defendant also, tending to establish the profits the mill made up to October 1st, 1897, for the purposes of estimating the profits that would have been made subsequently if the attachments had not been levied, the plaintiff would have proceeded upon another theory to show other and different damages, which, relying upon the rulings of the Court, the plaintiff did not offer, to wit: testimony, some of which offered and excluded, tending to show the deterioration of the property while the attachments were pending; testimony tending to establish more than by

mere incidental evidence the taxes, costs of repairs, cost of insurance and cost of keeping watchmen, and to have introduced further testimony tending to show the amount of capital invested and *the rental value of the property*, and for these reasons the ruling of the Court has taken plaintiff and his counsel by surprise, and to the plaintiff's prejudice and tends to destroy the right of the plaintiff to a fair trial by jury.

And this constitutes plaintiff's second exception.

And thereupon the plaintiff made and submitted a certain motion in writing, in the words and figures following, to wit:

Comes now the plaintiff by H. Bisbee, his attorney, and moves the Court to discharge the jury in this case, and continue and postpone the trial of the case to some future day of this term on the following grounds:

First. Upon the issues made by the pleadings in this action, the plaintiff entered upon the trial and continued in the trial thereof until the testimony was closed upon the theory and belief that if the plaintiff could prove that on October 1st, 1897, when these attachments were levied, it was then and had been for over four years engaged in an established business of manufacturing and selling yellow pine timber and lumber, and that up to said 1st day of October, its said business was a profitable one; and prove that as a direct consequence of such attachments, the plaintiff's business was broken up, interrupted and destroyed for a period of time as such consequence of said attachments; then one element of plaintiff's damages would be the profits it lost in its said business after October 1st, 1897, in consequence of such attachments. That the Court, over objections of the defendant, repeatedly ruled and held that testimony offered by the plaintiff was admissible and admitted such testimony tending to establish the amount of the profits of such business for

several months prior to October 1st, 1897. That such repeated rulings of the Court led the plaintiff
179 and its counsel to believe, and they did believe that such theory was in law correct, and that the Court would submit such testimony to the jury, to be considered by it in assessing the amount of damages plaintiff had sustained in consequence of such attachments, in connection with the question whether or not the plaintiff would have been financially able to continue its business after October 1st, 1897, during the period of time such attachments were existing and operative. That after the testimony in said action was closed on both sides and before any argument of said cause to the Court or jury, the Court, on the motion of defendant, after argument of such motion, ruled and decided to exclude from the consideration of the jury all such testimony and evidence, and also ruled and decided that the evidence adduced as to the financial ability of the plaintiff on October 1st, 1897, to have continued in business during said period of time if such attachments had not been levied. The Court on said motion also ruled and decided that the question whether or not the said attachments were the direct cause of preventing the plaintiff from continuing in business after October 1st, 1899, for the period aforesaid would not be submitted to the jury for its decision.

By such rulings of the Court on the said motion and after the testimony in the case had been closed, the plaintiff and its attorney have been taken by surprise, to plaintiff's prejudice. That if said testimony of the plaintiff in respect to profits prior to October 1st, 1897, had been excluded when offered, the plaintiff would have and could have adduced other evidence establishing other elements of damages, to wit: loss of profits on timber and lumber to large amount, which such attachments prevented the plaintiff from delivering under contracts

prior to October 1st, 1897, and which by such rulings plaintiff did not consider relevant or material.

Also, but for the reason aforesaid, plaintiff could have adduced evidence establishing the losses it sustained by decay and deterioration of its mill properties, docks and wharves connected with said mill, and costs of repairs, while said mills were idle and not used, in con-
180 sequence of such attachments, and the exact amount of taxes paid, and exact amount paid watchmen while said mill was so idle.

And on the further ground that a party to a suit during the taking of testimony cannot proceed on a certain theory of the law of the case, and after the testimony is adduced, change his position and ask instructions on another theory, to his adversary's prejudice, and what a party to the said suit cannot do, the Court itself cannot do to the prejudice of a litigant.

Which said motion the said Court denied upon the grounds that the plaintiff's counsel had had ample notice from the pleadings in the case that such testimony, relating to the damage to credit and loss of future profits, was only permitted to be introduced to determine how far it could prove certain and direct damages as the reasonably necessary result of the levying of the attachments, and that unless such damage was shown to be the direct and certain result from such cause, the Court would order it withdrawn from the jury.

That the case stood for a long time upon the order striking certain matters of damages from the declaration and it was only admitted upon the urgent application and argument of the plaintiff's counsel that it was impossible to determine until the testimony was heard, how positive and certain such damages might be shown to have been the direct result of the levy of the attachments and to the denial of such motion the plaintiff then and there and before the jury retired, excepted, for the reasons and

grounds stated in the said motion, and this constitutes the plaintiff's third exception.

And during the argument by plaintiff to the jury, by its counsel, the latter said:

I don't know how to argue it in, your Honor. You permit me to consider the evidence as to previous profits of the mill up to October 1st, for some purpose; what purpose, I dont know.

To which the Court replied: To show the damage suffered while the property was in the custody of the sheriff under the attachment. The evidence shows it was released on the 11th of October.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

"It is a question of fact for you to determine whether or not if these attachments had not been issued and levied,
the plaintiff would have been able to supply
181 its mills with logs after such attachments and
to what extent plaintiff would have been able to supply its mill with logs and continued in its business, and the amount of profit it would have made in such business in case said attachments had not been issued, provided you believe from the evidence that the direct consequence of such attachment caused the plaintiff to cease continuing in business, and that plaintiff would have and could have continued in business if such attachments had not been issued and levied and continued upon plaintiff's properties."

And the Court refused to give such instruction to the jury and to the refusal of the Court to give said instruction, the plaintiff then and there, and before the jury retired, excepted, on the grounds,

1st. That by such refusal the plaintiff was deprived of the right to have a material question of fact tried by jury.

2d. Because there was ample evidence upon which to submit such question of fact.

3d. Because the said instruction embodied a correct principle of law, applicable to the facts and evidence adduced in the case.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

The question whether or not the plaintiff was deprived of the means and financial ability to supply itself with logs for its mill and continue in business after October 1st, 1897, as a direct consequence of the issuing and levying of these attachments is one for the jury to decide.

Whether or not the plaintiff would have been financially able to continue in its usual business after October 1st, 1897, if these attachments had not been levied is a question of fact for the jury to decide upon a consideration of all the evidence in the case.

Which instructions the Court refused to give, and to the refusal of the Court to give said instruc-
182 tions, plaintiff then and there, before the jury retired, excepted on the grounds that such instruction presented and embodied correct rules of law, and requested the submission to the jury of material questions of fact.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

If you believe from the evidence that the issuing and levying of these writs of attachment injured and impaired the credit or financial standing as it existed on October 1st, 1897, then the plaintiff is entitled to recover such damages for injury to its credit as you find from the evidence the plaintiff sustained as a direct consequence

of the issuing and levying of such writs upon the property of the plaintiff.

And the Court refused to give said instructions to the jury, and to the decision of the Court refusing to give such instructions to the jury, the plaintiff then and there, before the jury retired, excepted, on the grounds, first, that there was ample grounds upon which to properly submit such instructions to the jury.

2d. That such instructions embodied a correct proposition of law, applicable to the facts of the case.

3d. Because said instructions presented a material question of fact.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

On the subject of the financial condition of the plaintiff with respect to its ability and means of continuing in its business after October 1st, 1897, you must understand that the question to determine in [is] not the opinion that any officer of the Atlantic Lumber Company entertained of the financial condition of the plain-
183 tiff, nor is it the question of the opinion entertained by any particular bank or other business house as to the plaintiff's financial standing, especially as if difference or controversies arise between them.

The real question before you is, what was the general financial condition of the plaintiff on October 1st, 1897, in respect to its ability and means of continuing in business, if these attachments had not been levied, and in reaching a conclusion on this subject, it is your duty to give weight to and consider the amount and value of all its property, its mill plant, lumber, timber and logs on

hand and good outstanding claims against third parties, and the amount of its liabilities due and not due on October 1st. You should also consider its business connections with those engaged in the lumber business, the good will of those engaged in such businesses, and its facilities for doing business, finding a market for the product of its mills, and of supplying itself with logs for its mills.

You have heard the testimony as to the available round timber or logs on and after October 1st, 1897, and from its evidence, applying your common sense to the subject, you will conclude whether or not it is reasonably probable or certain that the plaintiff with such means as it had at its command would have been able to have supplied its mill with logs during the time attachments rested on plaintiff's property, if these attachments had not been levied, whether what one has done, another with equal means and skill can do, is not a question of science or law, but one of fact for you to decide.

Which instruction the Court refused to give, to which refusal the plaintiff then and there, before the jury retired, excepted on the ground that it presented correct rules of law, applicable to the case and upon material questions of fact to be decided by the jury, and said instructions were necessary to aid the jury to properly understand the questions to be decided.

There has never been any pretense that said assignments of error are not in every way a full compliance with the rule of the Court on that subject.

Said exceptions and assignments are errors by the trial judge and Court of Appeals, upon the following important points, to wit:

1st. For granting, in part, the defendant's said motion to exclude certain testimony whereby the trial

judge refused to submit to the jury damages caused by the attachments.

2d. For refusing to grant plaintiff's motion for a continuance of the action, after granting defendant's said motion to exclude testimony, on the ground that the excluding of such testimony took plaintiff by surprise, after admitting such testimony over the repeated objections of the defendant, and deprived plaintiff of an opportunity of proving other legal damages, which it would have proved if the evidence of loss of the use of its mill plant had been excluded when offered.

FIRST OF ABOVE THREE POINTS, AND ARGUMENT THEREON.

Referring to defendant's motion to exclude testimony, the order of the Court thereon and *the reasons given by the judge for such order*, as set forth above, and found in the Record (pp. 96 to 100 and 111 to 113), it will appear that the Court based its ruling upon the ground that there were *three contemporaneous causes which contributed to the suspension of the plaintiff's business.* These causes were,

A. The *refusal* of the attaching creditor, *in its capacity as a vendor of logs*, to deliver any more logs after such creditor took out the attachments.

B. *The bringing of the two common law actions* by the attaching creditor, claiming heavy damages, *in which the attachments were ancillary.*

C. The suing out these writs of attachment.

The said reasons and contributary causes, as stated by the trial judge when he granted said motion, are in part in the following words, to wit: "If there was no combination of circumstances, other than the attachments,

had a third party come in and levied an attachment and stopped the business, and there had been no suspension (of the business), save by the attachments then there might have been such testimony as would prove a loss of profits; but in this case, the particular circumstances, *the suspension of the contract for the delivery of logs and the bringing of the common law suits so changed the circumstances that there is no certainty that there could have been any profit*" * * * the Court can not say that there is sufficient [evidence] *to justify a jury in finding, perhaps, large damages against the defendant in this case, on account of the loss of credit and profit from the levying of the attachments.*" Rec. pp. 98-99.

This language of the Court is not equivocal or doubtful in its meaning, though not very happily expressed. But taken in connection with the instructions refused, the reason operating in the mind of the Court for refusing to submit to the jury the damages for profits lost by being deprived of the use of the mills, *was that the jury could not separate, in dollars and cents, the amount of damages caused by the writs from the damages assumed to have been caused by the common law actions, and refusal to deliver any more logs.*

If there were doubt as to what the Court meant, it is set at rest in its instructions to the jury of its own motion in the following language, to wit:

The testimony being as hereinbefore set forth in the bill of exceptions, the Court instructed the jury, of its own motion, in the words and figures following, to wit:

"All these questions that have come up in regard to the damages; all this testimony that has come in to awaken your sympathies in behalf of one or the other, is not for you to consider; the only question is a clear-cut question; it is, how much damages did the Bucki Compa-

ny suffer. This question becomes more difficult by reason of facts and circumstances attending the writs of attachment. *At the time the writs of attachment were levied, there were two common law suits commenced, both of which have been terminated. That is one attending circumstance. The other is, that The Atlantic Lumber Company cancelled its contract or considered it cancelled. That is, the Atlantic Company refused and ceased to deliver any more logs to the Bucki Company. So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs, and the common law suits, unite in being the cause for subsequent suffering of damage by the Bucki Company.*

"The law is distinct, that where a party sets in motion a wrong, an intervening wrong will not prevent the party instituting or setting in force that wrong, from being liable for all damages which can be directly traced to that.

"But in this case, the attachment did not cause the stopping of the furnishing of logs, nor did the issuing of the attachment cause the institution of the
196 common law suits. I therefore say that it is difficult for you to determine how much damage the Bucki Company suffered by reason of the issuing of the attachments; not how much they suffered by reason of all the attending circumstances, but how much they suffered by reason of the issuing of the attachments.

"If there is any question upon which the Court considers a verdict would not be justified and any way it might be viewed, then it is the duty of the Court to withdraw from the jury that question.

"As I say, that law is that all the damages that can be awarded against a surety on the bond where there is no malice alleged, where a party becomes merely responsible for the direct damages that have been caused, the damages must be strict and positive.

"Taking into consideration the several causes, contemporaneous, tending to interfere with the business of the Bucki Company, tending to injure their credit or break up their business, I was satisfied from the evidence that there could be no positive, certain or direct damages which could be charged to the issue of the attachments as separate and distinct from the other causes in the case.

"I have therefore, as you have seen in the course of the case, granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all the profits the Bucki Lumber Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit. As I say, there was so much uncertainty, that there was no certainty under the law for determining what damages have been suffered by the party in his case.

"I therefore instruct you, gentlemen, that the *damages must be confined to the damages suffered by the detention of the mill for the time being. Those damages that have arisen by the detention of and taking the mill properties from the possession of the plaintiff.*"

Rec. 111.

Note—The last part of the above quoted instruction to the jury, to wit: *"The detention and taking of the property from the possesion of the plaintiff,"* refers to the period of time between October 1st and October 11th, 1897, *when the sheriff held all the logs in the boom, thus preventing plaintiff from sawing any of such logs.* This is also shown by the last part of the rules on the motion to exclude testimony, as follows: *"That evidence in regard to the profits* plaintiff's mill had been making prior to October 1st, 1897, *be retained and considered only for the purpose of determining the actual damages suffered*

during the time the operation of the mill was suspended on account of the attachments, and the motion be denied in all other respects."

Rec. p. 98.

This is further shown by the following, appearing in the bill of exceptions, to wit: * * and during the argument by plaintiff to the jury by its counsel, the latter said: "I don't know to argue it, your Honor. You permit me to consider the evidence as to previous profits of the mill up to October 1st *for some purpose, what purpose, I don't know.*" To which the Court replied: *"To show the damages suffered while the property was in the custody of the sheriff under the attachment.* The evidence shows it was *released* on the 11th day of October. (Rec. p. 102.) [The word "property" above refers to logs in the boom. The word "released" refers to the agreement with he sheriff, whereby plaintiff could saw the logs in the boom, and the lien of the writs be transferred to the manufactured product from the logs.] If the matter in the above note were not true, and *intended as a restriction to prior to October 11th* then the above *rulings of he Court against the plaintiff would be irreconcilably inconsistent* with the following rulings in its favor (to which defendant excepted and assigned error on its writ of error), to cover the time between October 1st and 11th, to wit: "One of the principal points in this action is as follows:

"The plaintiff claims that it should be compensated for the loss of the use of its mill properties caused by these atachments. The defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill properties while the liens of the attachments were upon them, because, as the defendant asserts, the plaintiff was in such financial condition that it could not have continued in business even if the attachments had not been issued and levied.

"This is a question of fact for you to determine upon all the evidence in the case, and if you believe from all the evidence in the case that if these attachments had not been issued and levied upon the plaintiff's properties it, the plaintiff, would have been able to continue in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as upon the evidence you feel convinced the plaintiff sustained as a direct and proximate consequence of these attachments." (Rec. on Defendant's Writ, p.36.)

Rec. p. 174.

And the judgment would have to be reversed on the sole ground of such inconsistent instructions.

The above instructions, last quoted, in favor of plaintiff, taken in connection with the language of the Court quoted in the above Note, *is conclusive that the trial judge did not for a moment consider the evidence from the books, and otherwise as to prior profits,* too uncertain upon which to estimate future profits lost, after October 11th, for the trial judge certainly did submit such evidence as to the damages by the loss of profits between October 1st and the 11th, during which period plaintiff could not saw any logs, because the sheriff had them in possesion, and ruled as to *such period of time that such damages were not too remote.*

THE PROPOSITION STATED.

The Court, then, has squarely before it the proposition was it or not error to refuse to submit to the jury the damages for the loss of the use of the mill after October 11th, *because* the jury could not determine to what extent the effect of the writs caused such loss, *separate and apart from the effect of non-delivery of logs*, and the common law actions.

The attaching creditor *was the author of the three* [asserted by the judge] contributory causes. These *asserted* three causes were in their origin contemporaneous, and operated from the same identical time., except that the Record shows that the *writs of attachments were issued and served* at 6:25 p.m. October 1st, while the summonses in the common law actions, while issued October 1st, were not served until October 2d.

Rec. p. 47.

The trial judge *assumed* that non-delivery of logs by the attaching creditor, and its common law suits, contributed to interrupting plaintiff's business, and that as the defendant surety company *was only bound to pay the damages caused by the writs of attachment*, it was not possible for the jury to separate the damages caused by the writs from the damages caused by the other two contributory causes. Therefore *the plaintiff has no remedy and must bear all the damages, and was not entitled to a jury trial of the issue involved.*

One of the fallacies of the said ruling consists in this: that plaintiff at least had the right to have submitted to the jury the question whether, *if these writs had not been issued*, the non-delivery of logs by the creditor and vendor and its common law actions would have caused any appreciable damage at all. The Court's *assumption* that they would have caused appreciable damage if the writs had not issued, was *erroneous. It was a question of fact for the jury to decide.* If the jury found that such other asserted contributory causes would not have caused any appreciable damage if the writs had not been issued, then there was not the difficulty *assumed* by the Court, of assessing all the damages caused by the writs. It was for the jury to decide *the length of time*, if any, that the plaintiff would have lost the use of its mill for want of logs, after the attaching creditor and vendor refused to deliver any more logs, before it could have obtained an

entire or *partial supply of logs* from other sources. *All these were questions of fact.* It was an absurdity for the Court to assume that the non-delivery of logs by this creditor and its common law action must have positively interrupted the plaintiff's business if there had been no attachments. Logs were the only things *needed* by plaintiff to enable it to continue business, and the other two causes did not, *necessarily*, disable plaintiff to obtain them.

This ruling of the Court below *was not in response to the motion to exclude testimony.* That motion did not ask any such ruling. It was based on the defendant's theory that the damages were too remote. The ruling was not moved for by either party, not argued by either party, and was taken by the Court of its own motion, with no opportunity to argue it and with little, if any, consideration

ANOTHER GROUND.

The ruling was erroneous on other grounds.

It was not pretended that either of the other two assumed causes of damages *were intervening causes*, and where there are two or more joint trespasses or two or more joint contemporaneous authors of a damage, *each of them is liable* for all the damages, and the injured party may sue one or all.

The defendant company cannot be in a better position than it would have been if the attaching creditor had sued out these writs, and one, "S." had refused to deliver the logs and one, "J.," had brought the common law suits, all on the same day and at the same hour.

In that event, *in the eyes of the law, as a practical science, and from the necessity of the case*, the author of the writs would be liable to all the damages, because in the contemplation of the law, *so far as the remedy is concerned, the writs caused all the damages*, and the surety

company is liable, because it was bound by the terms of its bond to pay all damages in consequence of the writs. Upon this principle, the surety, under his covenant, is liable for all the damages, and the law, *in the interest of, and to promote justice, will not permit the surety to say that other contemporaneous causes may have contributed to the damages.*

Otherwise, there would be a failure of justice, and the plaintiff must bear all the injury unredressed, though obviously very great.

To permit it to do so, on the ground that such damages are not within the condition of its bond, would be giving force and effect to reasoning too refined for social conduct, and an outrage on the plaintiff's rights. The argument of the Court below was: "The surety only agreed to pay damages caused by the writs; as the other two causes *may have contributed to the same damages, the surety is wholly discharged from the bond as to such damages.*" We submit, there is no precedent for such a ruling and it is not founded in reason.

We have found no case exactly like this, on the point in hand, but decided cases on questions closely allied to it, furnish ample authority for plaintiff's contention.

THE PROPOSITION.

Where defendant sets up that from another cause the injury may have happened, *he must allege and prove that the injury must have happened if the act complained of had not occurred*, and to establish that it *may* have happened is not sufficient.

Davis vs. Garrett, 6 Bing. 716, by Chief Justice Tindall, a case which has been followed in this country.

"When the injury proceeds from two causes operating together, the party putting in motion one of them is liable

the same as though it was the sole cause. This is one form of a universal principle in the law that he who contributes to a wrong, either civil or criminal, is answerable as doer."

Bishop's Non-Contract Law, Sec. 39.

In *Grimes vs. Bowerman*, 92 Mich. 258, s. c. 53 N. W. Rep. 751, which was an attachment case, the Court, in the syllabus, said:

"Where the plaintiff has been injured in his person or property by the wrongful act of the defendant, the fact that a third party by his wrong contributed to the injury does not relieve the defendant from liability, while the culpable act of a third party may have been the immediate cause of an injury, an earlier act of the defendant may have contributed so effectually to it as to be regarded as the efficient, or at least concurrent and responsible cause."

That decision states the law on the subject. The earlier act here was the issue of the writ of attachment. *Its issue and levy preceded* the summons in the common law suit, which was not until October 2d.

So that the earlier efficient act, *the first blow*, was the attachment and its levy. The contract did not provide for the delivery of logs every day, the effect of not delivering any logs on October 1st, or indeed for that entire month, would not be felt or cause any damage until the three million feet in the boom were sawed up, *which took six weeks*. As to this, the earlier act was also the attachment and levy.

A. unlawfully causes B. to be arrested and imprisoned, whereby B. is unable to perform a profitable contract upon which he is engaged. B. sues A. to recover damages for such arrest and imprisonment. A. answers and says to B.: You have no right to have that question

tried, because at the same time I caused your arrest, I seized and carried away the material you had on hand which it was necessary for you to have in order to perform your contract, and it is so uncertain whether you could have supplied yourself with other necessary material, if you had not been arrested, that the jury cannot estimate with any certainty how much damages was caused by the arrest.

A. is killed in a railroad accident. His administrator sues the company for damages. The company answers that A. was suffering from asthma or consumption, or a snake-bite, and might have died in a few days if he had not been killed, consequently he has no right to have his case against the company *tried at all.*

Such reasoning is fallacious.

In *Ring vs. Cohoes,* 77 N. Y. 83, s. c. 33 Am. Rep. 574, the Court said: "When several proximate causes contribute to an accident, *and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes.*" (See 8 Am. & Eng. Enc. of Law, 580,, 2d Ed., on subject of Several Proximate Causes.)

In *Hackett vs. Smelsley,* 77 Ill., 110, suit was brought by a wife against a liquor seller for selling liquor to her husband, to recover damages for injury to her means of support, caused by the selling of the liquor to her husband Held: "It will not avail defendant to prove that others sold liquor that may have contributed to the husbad's intoxication."

"If damage has resulted directly from concurrent wrongful acts, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally for the injury." (Cooley on Torts, p. 78, and cases cited.)

In *Davis vs. Garrett*, 6 Bing. ¶16, the Court said: "Where a loss has actually happened, *it is not sufficient for a defendant to establish that the same loss might have happened, but that it must have happened, if the act complained of had not been done.*" (Cited in Cooley on Torts, bottom of p.71-72.)

In *Peck vs. Neil*, 3 McLean, 22-24, it was held that defendant was liable if his acts contributed to the injury, though a third party's acts also contributed to the same injury.

In other words, the rule is expressed that it is not necessary to prove that the acts complained of here, the attachments, were the sole cause of the injury.

Lake vs. Milliken 62 Me. s. c. 16 Am. Rep. 456, and cases cited.

It cannot be doubted that the defendant, by the terms of its bond, is bound to pay all the damages that the attachments directly caused. Such is its covenant. It is even broader than that.

In *Lake vs. Milliken*, supra, the Court sais: "When the injury is the result of *two concurring causes, one party is not exempt from full liability*, although another party was equally culpable," and *that in any event it was a question for the jury.*

In 6 Bing., supra, Chief Justice Tindall says: "Defendant cannot apportion his own wrong, and defendant must establish that the injury must have happened but for the act complained of."

If all the alleged contributing causes were each approximate causes, "and each being an efficient cause, without the operation of which the injury could not have happened," the injury may be attributed to all or any of the causes. (8 Am. & Eng. Enc. of Law, 2d Ed., pp. 580-581; sub-div. (g) and cases cited.)

But it is obvious that neither the common law suits nor the refusal to deliver logs was an efficient proximate cause, without which the damages would not have happened. It is absurd, as a matter of fact, and certainly the Court cannot assume as a matter of fact that the asserted contributory causes would have caused the destruction of plaintiff's business if the attachments had not been issued and levied.

The following are cases where it was held that contributing causes do not defeat the right to recover full damages for the cause complained of:

Myers vs. Malcolm, 6 Hill, 292.

Chacey vs. Fargo, 5 N. Dak., 173.

If these common law suits and refusal to deliver logs had been acts of third parties, it is well settled that such acts would not defeat the recovery for full damages caused by The Atlantic Lumber Company, or its surety, the defendant.

Thus, the defendant's covenant is to pay the damages caused by the attachment. To hold that, where it is obvious the attachment did cause serious damages, and that because other even concurrent causes may have contributed to the same damages, there can be no recovery, would be a denial of justice.

The laws of Florida contemplate and provide for writs of attachment in a pending suit, but the statute requiring the bond does not contemplate, nor is it a fact that the pendency of the suit itself causes any injury that can be considered to reduce the damages caused by the attachment.

We think the contrary contention was never before made in any state.

In such case, the third parties and The Atlantic Lumber Company would be liable jointly or severally. It is so expressly held in:

Barrett vs. Railroad Company, 45 N. Y., 628.
Webster vs. Railroad Company, 38 N. Y., 260

In the latter case it was distinctly held *a refusal to charge* that if the acts of a third party contributed to the damages, plaintiff could not recover, *is not error.*

That rule of law being applicable to a case of contemporaneous contributory negligence, how much greater is the reason for applying it to the case at bar, *where the acts of The Atlantic Lumber Company were voluntary and deliberate, in suing out the attachments*, and defendant's becoming a surety was also voluntary.

To the same effect is *Burrows vs. March Gas Company*, L. R. 5 Exch., 67; *Pastene vs. Adams*, 49 Cal., 87.

Nothing can be shown in an action on the bond as a defense, except the truth of the existence of the grounds upon which it is issued.

Lobenstein vs. Hymson 90 Tenn., 606; s. c. 18 S. W. Rep., 250;

Drummond vs. Stewart, 8 Iowa, 341.

The surety is as much responsible as to actual damages for *"setting a-going"* the proceeding, as is the attaching creditor. (1 Shinn on Attachment, p. 329, citing 49 Mo., p. 25.)

No man or corporation ever went on attachment bonds for $85,000, without being fully advised of the nature of the attaching creditor's claims and risks taken.

The Supreme Court of Alabama had this subject before it in *Louisville Railroad Company vs. Jones* (1888), where in a suit by Jones for damages for personal injuries by defendant's negligence, the railroad company set up that plaintiff, at the time of the accident. *had pneumonia, which contributed to plaintiff's death.* Held: That the company must establish that he *must have died* from the disease, not *may have.*

that it was a question for the jury.

Id. 3 Sou. Rep., 902-904 and notes, it was also held

In *Beauchamp vs. The Mining Company,* 15 N. W. Rep., 65 (Mich.), where a similar defense was set up, it was held: That death must be referred to the cause complained of, unless it be shown that death must have resulted if the act complained of had not occurred.

It was for the jury to decide whether the other so-called causes so infected plaintiff's business with disease that it would have ceased to do business if the other injury, the attachments, had not happened.

In *Beauchamp vs. Saginaw Company,* 15 N. W. Rep., 65 (Mich.), the Supreme Court of Michigan quoted approvingly from *Baltimore Railroad vs. Reaney,* 41 Md., 117, as follows:

"But it is equally true that no wrongdoer ought to be allowed to apportion or qualify his wrong, and that, as a loss has actually happened while his own wrongful act was in force and operation, he cannot be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was in operation by his own wrongful act. To entitle such a party to exemption, he must show not only that the same loss might have happened, but *that it must have happened, if the act complained of had not been done.*" (Citing *Davis vs. Garrett,* 6 Bing., 716.)

The Supreme Court of Michigan further said in that case:

"If the injury received, and the sickness following, concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor. It cannot be said that there was a wrongful second act, or a disease wholly independent of the first wrong, which

caused the death of the boy." (Citing *People vs. Cook*, 39 Mich., 239.)

To like effect is *Railroad Company vs. Kemp* 43 Am. Rep.. 134 (Md.).

Now, we submit that the question whether one would have died from pneumonia if he had not been injured in an accident, is more replete with uncertainties, and a more difficult question for a jury to decide than whether plaintiff, with the property and assets it owned and credit it enjoyed prior to the attachment, it being then a going and flourishing concern, would have been able to obtain a full or partial supply of logs, and continued business.

On this subject, the Court is urged to consider that upon the evidence stated in the bill of exceptions, the following points of fact are undisputed:

(a) That on October 1st, 1897, plaintiff had on hand abundant orders for timber and that it had never closed down its mill for want of orders.

(b) That about October 1st, 1897, the prices of lumber commenced to advance, and continued to advance through 1899, from which it could be properly inferred there would be ample demand for the future product of plaintiff's mill.

(c) That plaintiff's mills were, on October 1st, 1897, in good condition, manufacturing their usual output, and between October 11th and November 16th actually sawed in thirty working days 3,600,000 feet, or 120,000 feet per day; and then closed down because it had sawed up the 3,000,000 feet of logs in the boom and was unable to buy more.

(d) That logs for a full supply of plaintiff's mills could have been obtained within six months at the outside, and the weight of the testimony, that of Ambler,

Bucki and Heagey, within two months, Ambler qualifying his testimony by saying that "irrespective of profits" it could have been done within sixty days. (Making profit in logging would not have been a consideration with plaintiff. It had been paying seventy-five cents above the market price and had, notwithstanding, made large profits, prior to October 1st, 1897. Plaintiff would only have calculated on getting logs at such a price as would have enabled it to have made its usual profits by manufacturing and selling.) (Rec. pp. 95-96.)

(e) Plaintiff's officers had had large experience in logging, knew where timber was to be found in abundant quantities, and had within their control thirty-three miles of railroad iron, fifty-two truck cars and three engines, available, with some repairs, for logging. (Rec. pp. 80, 81.)

(f) That it had ample means of obtaining the requisite number of mules, tackle and logging carts, and laborers to cut and haul the logs.

With all its assets, amounting to *two hundred and ten thousand dollars, at least*, including cost of mills, and with no pressing debts or obligations, except the claims of The Atlantic Lumber Company, which did not exceed, in reality, in any event, six thousand dollars, and this was disputed because of small size of logs, could any jury have hesitated to find that there was reasonable certainty that plaintiff, by logging itself or buying logs of others, or both, could have supplied its mills with logs? (Rec. pp. 97, 98, 99.)

We submit that it could not, and that the question should have been submitted to the jury.

All of the above facts clearly appear in the bill of exceptions, embracing 81 pages. (Rec. pp. 55-136.)

Unless it is established that some other cause must have produced the damage, it will be attributed to the act complained of.

In *Milwaukee etc., Railroad Company vs. Kellogg*, 94 U. S., 470, the Court said: "When there is no intermediate efficient cause, the original wrong must be considered as reaching the effect and proximate to it."

Refinements beyond this rule "are too minute for rules of social conduct." (Id. 476.)

And it is the province of the jury to examine any succession of events and determine what was the proximate cause. (Id.)

In all these cases, and upon all these points as to cause and effect, it is a question of fact exclusively for the jury.

Jacksonville, etc., Company vs. Peninsular, etc., Company, 27 Fla., 116, and cases cited.

And the rule of damages is a question of local law:

8 Am. & Eng. Enc. of Law, 2d Ed., 581.

94 U. S., 470.

WANT OF CERTAINTY OF PROOF.

It may be contended that the assumed difficulty the jury would have had in separating the amount of the damages caused by the attachments from the amount assumed to have been caused by the common law suits, and loss of log supply from The Atlantic Lumber Company, was not the only ground on which the Court refused to submit the question to the jury. But if that ground is admitted not to justify the action of the Court, what other ground can possibly be invoked to justify it?

Certainly none, because there was no evidence tending to establish and justify a finding that the plaintiff could

not have continued in business, if no attachments had issued, though the common law suits had been brought and The Atlantic Lumber Company had refused to deliver more logs.

A supply of logs would have been the only thing wanting to enable the plaintiff to continue in business, and the case would stand as follows:

(a) The evidence is not disputed that there was plenty of standing timber in the market. (Rec. pp. 81, 82.)

(b) That the mill was located at Jacksonville, where railroads from timber lands centered. (Rec. p. 79.)

(c) That the mill was located on the St. Johns river, which, with the tributaries, furnished carriage by water for logs from millions of acres of standing timber. (Rec. p. 79.)

(d) That The Atlantic Lumber Company alone has continued to get out and deliver to other mills two million feet per month since October 1st, 1897. And that there were other loggers. (Rec. p. 81.)

The only remaining element to enable the plaintiff to have continued in business was: Had it the means to get logs, or to buy them with?

On this point the case stands as follows:

(a) The mill plant, costing not less than one hundred and thirty thousand dollars ($130,000), in good condition, was entirely *unencumbered.* (Rec. p. 96.)

(b) It had on its docks and wharves over 8,000,000 feet of timber and boards, including logs in boom, *entirely unencumbered,* which, at an average of ten dollars per

thousand, at Jacksonville, would amount to....	$ 80,000
Good bills receivable	15,000
Timber afloat, 1,000,000 feet.....	10,000
	$105,000

(Rec. p. 96.)

(c) Its total liabilities were.....	$ 63,000
Of which there was held by stockholders of the Company, who did not want payment,....	32,000
Leaving current debts amounting to	$ 31,000

(See Rec. p. 97.)

And some of this claimed by Atlantic Company and the Bank disputed. (Rec. pp. 97, 98, 111.)

(d) Two of its principal stockholders owned thirty-five miles of iron rail, fifty-two trucks and three engines, suitable for logging, with some repairs, and which plaintiff could control for that purpose. (Rec. pp. 80, 81.)

(e) Its officers and agents were experienced as loggers and it had plenty of orders on hand.

(f) It had 3,000,000 feet of logs on hand when the attachments were levied.

With such evidence before the jury, it is incredible that the Court took the said question from the jury on the ground that there was no evidence tending to prove that plaintiff could have obtained logs and continued in business.

Besides, excepting The Atlantic Lumber Company's claim for about $8000, and a draft for $5,340.75, against which plaintiff claimed a set-off, it had *not a debt due*, except what was due laborers who are paid periodically, and were paid in full October 11th, 1897. (Rec. pp. 97, 98, 99.)

PLAINTIFF'S FINANCIAL CONDITION — ADMISSION BY DEFENDANT AS TO ASSETS.

The defendant admits in its own bill of exceptions, on its writ of error (Rec. p. 68), that between October 11 and December 28, 1897, the plaintiff received, as the proceeds of about 4,000,000 feet of lumber shipped, the sum of about $40,000. (Rec. p. 201.) It still had about 4,000,000 feet more to ship. Plaintiff had gained possession of this lumber by giving forthcoming bonds, and held it as *bailee of the sheriff*. In the eye of the law, this lumber remained in the sheriff's possession to abide final judgment in the actions, and plaintiff was bound to deliver it back to the sheriff if the attaching creditor had maintained its writs. Plaintiff took the risk of shipping this lumber (which was sold before the attachments issued, to avoid damages by breach of contract with the buyers.

With the proceeds it paid the creditors who had become clamorous, as a result of the writs. Much of such *proceeds were eaten up* in Court expenses, counsel fees, salaries of employees, and office rents in Florida and in New York, under unexpired leases.

NO CASH ON HAND.

Defendant, with much apparent joy, parades before the Court the fact that on October 1st, 1897, the day of the attachments, the plaintiff had no cash on hand. Defendant and the attaching creditor well knew the reasons why plaintiff had no cash on hand on *that day*. For over *three months* prior to October 1st, it had been unable to realize on its lumber, because the purchasers, under their contracts, did not pay for it until *loaded on vessels;* that,

owing to a temporary scarcity of vessels, they could not be chartered by the purchasers to remove the lumber.

Meantime, plaintiff kept sawing and piling up lumber on its yards and docks at a cost of $18,000 per month, the most of which it paid. The cost of logs alone, purchased from the attaching creditor, was $7.25 per thousand, or $14,500 on 2,000,000 feet—*its monthly consumption of logs.*

Plaintiff had paid this attaching creditor for logs *within two weeks next prior to October 1st,* on account of logs, $10,000, though much inferior to logs contracted for. All these facts are undisputed. (Bill of exceptions, Rec. p. 86.) Necessarily, plaintiff *had exhausted* its accommodations of cash from prior sales and its line of credit, temporarily, in the two banks in New York city, with which it did business.

To tide over this unexpected emergency, arising from the scarcity of vessels, plaintiff had consummated a temporary loan of $25,000 from Sheppard, Morse & Co., of Boston, *one of its customers, to be paid for with boards already sawn, with security on its mill plant,* until the boards could be delivered in Boston. This was all the cash it needed. This trade with the Boston concern had been delayed several weeks by reason of the *flaw* discovered in the title to its realty, of there only being one witness to a deed, in the chain of title, whereas the law required two. But on September 30th, p. m., the *day before the writs were levied, this flaw had been cured* by the discovery *of a deed with two witnesses, the title* pronounced perfect by counsel for the Boston company, the notes and mortgage for the $25,000 had been delivered to the Boston company and the $25,000 would have been received in New York office not later than October 3d if these writs had not been levied. *They were levied to defeat the receipt* of the $25,000, *and did defeat it.*

Nevertheless, within a few days after these writs were levied, the plaintiff's officers came from New York to Florida with $10,000 in their pockets, advanced to plaintiff by the Yellow Pine Company (a purchaser of a large part of plaintiff's output of lumber), and under said arrangement with the sheriff, resumed sawing.

All these facts are undisputed, and defendant company and the creditor knew them. (Rec. pp. 86, 72, 73.)

In the light of such evidence, the *flourishing* the fact that plaintiff had no cash on hand on October 1st is not a praiseworthy act. *It certainly would have had no influence on a jury on the question of plaintiff's financial ability to have continued in business after October 1st.*

Some of plaintiff's drafts for logs went to protest. Defendant company also sought to show inability of plaintiff to continue in business after October 1st, because of injured credit by certain drafts going to protest. Between July 15th and August 15th, 1897, a few drafts did go to protest, but were all quickly paid. The drafts were sixty and ninety-day drafts, and were drawn *on the expectation that lumber on hand would be shipped to meet them*, which, owing to such scarcity of vessels could not be shipped.

This evidence as to protested drafts was illegally admitted, to effect the condition of plaintiff's credit *on October 1st, because it is an admitted fact* by defendant itself *that all of such drafts were paid a few days after maturity, and all paid by August —six weeks prior to the attachments.*

Plaintiff had practically overcome this unexpected state of affairs arising from want of ships, *which it was the duty of purchasers of lumber to charter.* Its mills were running at their full capacity on October 1st, the output on that day being 100,000 feet. A few days after October 1st, and after the attachments, it paid off its employees. It had but *one piece of paper overdue and*

outstanding. This was a draft given on August 16th to this attaching creditor as a vendor of logs for $5,340.75, of which $3,340.75 was for logs *delivered prior* to August 15th, and $2,000 was *an advance to such vendor for logs to be thereafter delivered.* (Rec. pp. 84, 85 89.)

Said draft was due *ten days after date.* It was negotiated and discounted and on October 1st was held by the National Bank of Jacksonville, *which cashed it.* It had not been paid for two reasons:

(a) Because the holder was not alarmed about payment and because of non-arrival of vessels, and,

(b) Because plaintiff claimed a set-off to it of $4,000.

The evidence establishes all such facts beyond dispute. (Rec. p. 83.)

Therefore the fact that such drafts were protested and all paid *six weeks prior to the attachments,* would have had no weight with a jury on the issue of plaintiff's credit or ability to continue in business, on and after October 1st, 1897.

Such testimony could be relevant for no other purpose, and was illegal for that purpose, for the reason the drafts, being paid six weeks before the attachments, had tendency to establish that on October 1st the plaintiff could not have continued in business if these writs had not issued. (See testimony of Meigs, an officer of the attaching creditor, pp. 84, 85.)

Considering the cost of its mills, about $150,000, its assets on hand; that there was not a lien of any nature upon any of its properties; that not a suit of any nature was pending against plaintiff, prior to October 1st, 1897; that it had but the one matured piece of paper outstanding, and for only $5,340.75, with lumber on hand for which

it would have received not less than $65,000 in a few weeks; its lumber afloat and bills receivable; that its total debt was but $63,000, $32,000 of which held by two stockholders, *who did not want payment* but interest on it; much of this followed, doubtless, in consequence of scarcity of vessels; only $31,000 current debts, *including* the attaching creditor's liquidated claims, largely disputed, and amount due employees, which was promptly paid, and said draft for $5,340.75—*it is plain the plaintiff's financial condition was exceptionally good;* and few business concerns in that branch of business could make as good a showing—there is hardly room for doubt of plaintiff's ability to continue in business.

In any event, the plaintiff had a right to have the question of its ability to continue in business (but for these writs) submitted to the jury, as well for the time *after* as before October 1st, because it was a question of fact.

In the case of *Grimes vs Bowerman,* 92 Mich., 258, where the defendant in attachment *was greatly embarrassed,* it was expressly ruled, that *his ability to carry his debts and continue in business was a question for the jury.* You might as well say, in an action for lost profits for a breach of contract, the plaintiff's ability to continue to perform shall not be tried by a jury.

The trouble was, plaintiff had too much lumber on its docks.

The proof established that for several months next prior to October 1st, the net profits of the plaintiff's business was $5,000 per month, notwithstanding the fact that its sawmill was shut down half of the time in August and September,*because the wharves were so crowded there was no room to pile lumber on them to advantage.* Defendant admits this. (See Rec. p. 80, Defendant's Rec. p. 49.)

And the defendant and The Atlantic Lumber Company knew perfectly well nearly the entire output of its mills was sold for the year A. D. 1897; and had ample means to meet all of its liabilities. It also knew that plaintiff was not doing business upon borrowed capital; that it was not a borrower of money in the markets, and that the loan negotiated with Sheppard, Morse & Co. was only temporary, and was rendered desirable by the crowded state of its wharves, and that these attachments would defeat such loan.

The Atlantic Lumber Company was seeking a pretext to break its contract for log deliveries, because it was delivering logs smaller than called for by its contract, and the price of logs was increasing in the market, and it could sell its logs at a higher price than plaintiff was paying.

CERTAINTY OF PROOF.

While we do not think the rule of requisite certainty of proof is involved, because of the refusal of the Court to submit the main question to the jury was not on that ground, we cite some authorities on the subject.

Reasonable certainty, or reasonable probability, is the correct rule, as distinguished from speculation and guess work. (Sedgwick on Damages, Sec. 177, 182.)

This "reasonable certainty does not mean absolute certainty, but reasonable probability." (Sedgwick, p. 249.

"But the fact and amount of future loss is a question for the jury, which has discretion in establishing it."

Id. p. 249.

Allison vs. Chandler, 11 Mich., 542.

Where it was held that plaintiff has sustained damages by interruption of business by defendant's acts,

though innocently done, the amount of damages must be submitted to the jury upon all the evidence the nature of the case is susceptible of, even though such damages cannot be estimated with a great degree of certainty. "and the actual damages must be more or less a matter of opinion."

Id pp. 560, 561.
6 Bing., 68.
10 N. Y., 489.
17 Wendell, 71.
120 U. S., 647.

Even in case of any doubt, justice requires that the loss should fall upon the defendant who has caused the injury, and not upon an innocent plaintiff. (11 Mich., 554, 555.)

"The Court has no concern with the weight to be given to evidence which was properly admitted." (140 U. S. pp. 77-91.)

The same principle applies as in case of contributory negligence, and in such cases where the facts are such that "reasonable men may fairly differ" they must be submitted to the jury.

Grand Trunk Railroad Co. vs. Ives, 144 U. S.,408.
159 U. S., 603.
168 U. S., 339.

From the language of the Court stated in the 24th assignment, it appears that the Court was greatly concerned about the "difficulty" the jury would have in assessing damages, and therefore concluded not to allow them to assess any at all. (Rec. p. 44.)

In *Simpson vs. Railroad Company*, 1 Q. B. Div., 274, Cockburn, Ch. J., said: "As to the supposed impossibility of ascertaining the damages, I think there is no such

impossibility. To some extent, no doubt, they must be a matter of speculation, but that is no reason for not awarding any damages at all."

And Mellar, J., said: "As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, *that is not a matter upon which we have to trouble ourselves.*"

Frier, J., said: "As to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost, a sufficient answer is that it must be assumed that the plaintiff would make some profit." (See also 120 U. S., 647.)

The case of *Simpson vs. Railroad Company*, supra, is cited in *Wakeman vs. Wheeler Wilson Company*, 101 N. Y., 205, s. c. 4 N. E. Rep., 264.

This is a valuable case to the point that though there may be difficulty in arriving at the damages, there is no reason for not submitting the subject to the jury.

1 Sutherland on Damages, 113.

10 Allen, 138.

Wells vs. National Life Assn., 99 Fed. Rep., 222.

In that case, the Court has cited approvingly several of the leading cases relied upon by plaintiff in error, and it is conclusive that the damages caused by interruption of plaintiff's business by the attachments should have been submitted to the jury; even admitting that the alleged contributory causes might make the assessment of such damages difficult.

Clearly, the uncertainty of proof as to how much Wells might have made in the business of insurance in a certain territory, for a period of years, was greater than the uncertainty of proof as to how much plaintiff lost in its business by the interruption thereof, caused by the attachments.

Profits of an established business may always be received even in the performance of a contract, if they can be proven with reasonable certainty, or reasonable probability.

I Sedgwick on Damages, 8th Ed., Sec. 182.
10 N. Y., 489.

Anville Mining Company vs. Humble, 153 U. S., 540; in which the opinion of the Court, pp. 549-550, is peculiarly applicable to the case at bar.

In the case of the "Conqueror," 166 U. S., 110, it was held: "The value of her use to the owner, while detained, was a proper measure of damages; and that the books of her owner, showing her earnings prior to detention, are admissible, to show probable future earnings."

Id. p. 127; also
1 Sedgwick, Sec. 182.
I Sutherland, Secs. 54, 59, 70.
18 Fed., 316.
12 Fed., 266, 267.
2 Woods, 603-599.
22 Fed., 220-224.
Max vs. Strous, 93 Ala.
S. C. 9 So. R., 88.
70 Ala., 38.
23 Ohio St., 358.
80 Texas, 195.
92 Mich., 260.
120 U. S., 630-648.
Pollock vs. Gantt, 69 Ala., 373.
S. C. 44 Am. Rep., 519.
48 Am. Dec., 194.
10 So. Rep., 372 (La.)

The common law suit laying large damages *would not have produced any immediate effect upon plaintiff's*

business or credit. But very few persons would immediately know such a suit had been brought.

The plaintiff would not have been interrupted, or its credit injured as an immediate consequence of serving such a summons.

The refusal of the Atlantic Lumber Company to deliver any more logs would have produced no immediate injury to plaintiff's business or credit. It had 3,000,000 feet of logs on hand, and its business would have gone on as usual (as it did go on, with the permission of the sheriff), for at least about six weeks.

But when the attachments were levied, immediately plaintiff's logs were taken from its possession, and sawing stopped. Five million two hundred thousand (5,200,000) feet of lumber was taken from plaintiff's possession, and its shipment was stopped at once. Thereby its credit was injured and its means of business taken away from it.

It is therefore apparent that the immediate and proximate cause of the *initial injury to plaintiff's business and credit was the issue and levy of the attachments* and the common law suits and the refusal to deliver logs did not even contribute to such initial injury.

Part of the damage was done when the attachment was issued; this would be known to the world at once. The levy and continuance of the lien of the levy simply augmented the damage. The common law suits and refusal to deliver logs could not have had any appreciable effect in aggravating the damages. They cannot even be treated as concurrent or contributory causes. They were, if anything, intervening, but not efficient, causes, because they could produce no injurious effect until after the attachments were levied.

But no jury would decide that they were independent efficient intervening causes of the damages which necessarily were directly caused by the attachments. As mere contributory cause, they cannot be allowed to affect the

right of recovery of damages for the wrongful attachments. The dominating, overmastering cause was the attachments.

Plaintiff has no remedy for the commencement of the common law suit, unless it was malicious and, even then, it is doubtful.

Plaintiff's remedy by suit for the refusal to deliver logs could not include damages for the interruption of plaintiff's business or to its credit, for the measure of damages would be simply the difference between the price The Atlantic Lumber Company had agreed to deliver logs for, and the market price, or cost of supplying them from other sources. As such cost might be less than the contract price, there might be no damage.

Therefore, if the ruling of the Court below is correct plaintiff has no remedy for the interruption of its business and injury to credit caused by the attachments. The result would be a denial of justice, or the right to have any such damages as a jury may assess. For if the jury once found that the attachments caused the interruption of business and damage to credit in connection therewith, the evidence of past profits would entitle them to estimate the damages with accuracy.

We ask the opinion of this Court on the above assignments of error upon these points.

(a) That there can be no abatement of damages resulting from the attachments, because the common law suits or refusal to deliver more logs may have contributed to such damages.

(b) That the amount of damages from interruption of plaintiff's business caused by the attachments must be submitted to the jury, and that the question to what extent the common law suits or refusal to deliver logs contributed to such damages must not be submitted to the jury.

PRESUMPTIONS.

1st. From the fact that plaintiff was able to operate the mills from April, 1893, to October, 1897, a presumption arises it would continue to be able to do so, in the absence of evidence to the contrary.

2d. It being established that there was an abundant supply of logs in the region of, and accessible to, plaintiff's mills, *not owned by the Atlantic Lumber Company*, the attaching creditor, it would be a presumption, in the absence of evidence to the contrary, that a log supply for plaintiff's mills could be obtained, that such log supply *was not dependent on one logger, the Atlantic Lumber Company*, and that *other loggers* could furnish logs to plaintiff at a cost no greater than it had been paying said company, which *was seventy-five cents above the market price of such logs.*

3d. It would be presumed in this case, as in others, that the *natural laws of supply and demand would be operative*, and that the supply would be equal to the demand—the supply being shown to exist in the forests beyond question.

Plaintiff's officers were experienced loggers, and their testimony is that they could have commenced delivering into the boom *a full supply within sixty days*, if the writs had not issued. (Rec. pp. 80, 81, 95 and 96.)

Ambler, the president of the attaching creditor, admits such a supply could have been obtained within sixty days, if no *profit* in logging was considered. (Rec. p. 81.)

Plaintiff had no need to do logging *at a profit;* the profits in manufacture was all it had to consider. Meigs

general manager of the attaching creditor, *under certain conditions, he states, testifies it would have taken plaintiff* six months to have prepared to deliver at its mills a full supply of logs. (Rec. p. 95.)

But as shown, plaintiff had the equipment on hand.

One, Murphy, testified for defendant that to supply plaintiff's mill with logs, would have required an investment of $150,000 to $250,000, including iron rails.

Murphy was a mere clerk or salesman, living in New York city, and it was not shown that he knew anything about logging in Florida, or that he ever had had any experience in that business anywhere. It was clearly incompetent, and would have had no weight with the jury. Meigs, himself, placed the cost of such logging equipment at $50,000 to $75,000, including iron rails, and he had had extensive experience in Florida. (Rec. pp. 83 and 102.)

But it is undisputed that Charles L. Bucki and his mother, Frederica Bucki, under the firm name of L. Bucki & Son, *owned and had in their possession, laying idle in Florida, thirty-four miles of iron rails, suitable for logging purposes, and three locomotive engines,* and fifty-two flat cars, which, with some repairs, could have been immediately brought into use in a logging business and that *they owned nearly all the stock of the plaintiff company.* (Rec. pp. 80, 81.)

So that all it was necessary for plaintiff to purchase for a logging outfit was some mules, harnesses and carts, and repair cars and engines. To do this with, if these writs had not issued, plaintiff would have had its mill plant, which cost about $150,000; its bills receivable, about $15,000; its lumber afloat, $10,000; its 80,000,000 feet of manufactured lumber on its yards and docks, (including that cut from the 3,000,000 feet of logs in the boom, which cost $7.25 per thousand, or $21,750).

This 80,000,000 feet was nearly all sold, waiting shipment, and there was an active market for that unsold. Sixty-eight per cent of it was square timber, and a large per cent of the remainder was first-class boards, and it was worth not less than $65,000.

Thus, plaintiff had in such assets, after paying all its floating current debts of $31,000, about $60,000 in lumber *and its mill plant, not a lien or encumbrance of any kind upon it*, with which to continue in business, *and not a suit pending against plaintiff.*

Scarcity of vessels to ship the lumber was only temporary, as it subsequently turned out.

In such financial condition, it is nonsense to contend that plaintiff could not have continued in business, if these writs had not issued.

And we repeat, the ruling of the Court, refusing to submit the question of damages from the loss of the use of its mills, after October 11th, was not placed on that ground.

The defendant's contention on that ground *was overruled*, and the trial judge based his rulings on the ground of *contemporaneous contributory causes*, which we submit was error, prejudicial to the plaintiff, and that the assignment of such error is well taken.

Points of Law.

If the lower Court's reasons for taking the case from the jury, to wit: because of contributory causes, were erroneous, it may be urged that the ruling was right though its reasons wrong, *because loss of profits from loss of use of mill was too remote*, and in no event should that element of damages have been submitted to the jury. *because too remote.*

Plaintiff insists such damages were not too remote, and that that question was one for the jury.

We think it is satisfactorily established that the trial judge refused to submit this element of damages to the jury, *except for the period of time between Friday, October 1st, 1897, in the evening of which day the attachments were levied, and Monday, October 11th of said year,* the day the plaintiff resumed sawing under the agreement aforesaid with the sheriff. During such excepted period of time, the sheriff had the possession of the logs in the plaintiff's boom, by his seizure under the writs, and it was impossible for plaintiff to operate the plant.

As shown, the trial judge ruled that such damages were not too remote, and submitted them to the jury for the *period of time between October 1st and October 11th*, and submitted the evidence of plaintiff's books to the jury, showing *past* profits *to enable them to estimate* such damages for the *period aforesaid.*

Now, if such damages were not too remote for that period, they were not too remote for the period of over twenty months *after October 11th.*

And it is evident the jury understood the apparent conflicting instructions, as already explained, and that the damages for loss of the use of the mill plant, after October 11, was not submitted to them. For their general verdict was for $10,880, whereas if such damages had been submitted for the period of over twenty months after October 11th, it necessarily would have been much more, and could easily have been over $100,000.

The only elements of damages submitted to the jury, apart from lost profits, between October 1st and the 11th, were as follows:

(a) Profits lost on three cargoes of lumber, one to Boston, one to New York and one to Baltimore, because of inability to ship it while under attachment.

(b) Legal interest on the value of lumber detained by the writs.

(c) Wages paid employees, idle by reason of the attachments.

And the testimony establishes that *said three elements of damages* easily aggregated $10,880, the amount of the verdict.

There can be no question but that the jury excluded all damages from loss of use of mill plant subsequent to October 11th, according to instructions of the Court. For excluding such damages, error was assigned in the Appelate Court, and is assigned now. Rec. pp.32-34.

A majority of the judges of the Court of Appeals expressed no opinion on these assignments, but by silence affirmed the action of the trial judge.

Judge Shelby delivered an opinion denying plaintiff's right to recover for the loss of the use of the mill plant *at all, either before or after October 11th.*

48 C. C. A., 437, *et seq.*

And based his opinion on the sole ground that such losses were *too remote,* and ruled they could be recovered in an action for malicious prosecution of the attachments. Rec. p. 138.

THE PROPOSITION PRESENTED.

The proposition now presented for decision is this: that such damages are not too remote, unless the covenant in the bond to pay *all damages sustained in consequence of improperly suing out the writs.*

Condition of Bond, Rec. p. 9.

It cannot be pretended that the writs did not deprive the plaintiff *of the use of its manufactured product seized, of the value of $65,000.* It cannot be denied that the levy of the writ for $75,000 *created a first lien on the mill plant for that sum of money.*

It cannot be denied that if these writs had not issued, plaintiff, after paying current debts, would have had the manufactured product of its mills of the cash value of $60,000 and its mill plant, free from all liens, as a basis for credit with which to have bought or obtained logs and continued in business.

The $60,000 alone, apart from its unencumbered mill plant, as already chown, would apparently have been ample for such purpose.

Therefore the argument comes to this: *the writs did directly deprive plaintiff of the use of its assets in the business, to wit: its lumber and mills.* It could not sell and use the proceeds of its lumber in its business, for it was under attachment for $85,000. It could not raise any money on its mill plant, for it was under attachment for $75,000.

The writ for $75,000 was levied on the plant.

A mill plant, unless it is a going concern, is of little value. No one would lend money on the mill plant with an attachment lien on it for $75,000, though it cost twice that sum.

Assuming then that a finding that the plaintiff *had the financial means, if these writs had not issued,* to have continued in business, *either operating its mill at full or part capacity,* would have been justified, the question is:

(a) Did the deprivation of such means, in consequence of the writs, cause a deprivation of the use of its mills?

This was a question of fact for the jury.

(b) **Are profits lost by the loss of the use of the plaintiff's mills *too remote to be recovered in a suit on these bonds?***

This is a question of law, and it is an *established principle of law that the recovery* of profits of an established business is not *too remote*, whenever the amount thereof is provable with reasonable certainty, and evidence of past profits of such a business is good evidence upon which to *estimate the lost profits.*

POINT OF LAW.

We insist that *the rule of the measure* of damages in an action of trover or trespass, for the mere seizing and detaining of personal property, either on final process or by attachment, *has no application to this branch* of the case at bar.

These writs were issued on a claim of *debts due.*

The Revised Statutes of Florida authorize an attachment *only upon certain conditions*, to wit: "Before any attachment shall issue in any of the foregoing cases (reference being to Sections 1637 to 1640), the plaintiff shall file in the Court from which he desires the attachment, an affidavit in writing, sworn to by himself, his agent or attorney."

Revised Statutes, Section 1641:

"Attachments, when debt is due.—In cases where the debt is actually due, such affidavit shall state the amount of the debt, or sum demanded; that the same *is actually due*, and that the affiant has reason to believe in the existence of one or more of the special grounds hereinbefore enumerated in Section 1637, stating specifically such special grounds."

R. S. Sec. 1642 and Section 1646 provide as follows: "No attachment shall issue until the person applying for the same, his agent or attorney, shall enter into a bond, with at least two good and sufficient sureties, payable to the defendant, *in at least double the debt or sum demanded, conditioned to pay all costs and damages the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment.*"

The condition of the bond required by statute is *very broad*, and the liability is consequently broad. The obligor is bound to pay *all damages sustained as a consequence* of "improperly" suing out the writ.

"Improperly" is a very broad term, more perhaps so than "wrongfully," employed in the statutes of some of the states.

In any event, if the plaintiff files a false affidavit, *either as to the amount of debt due, or grounds of attachment*, the writ has been "improperly" sued out, and when the attachment is dissolved, the obligor on the bond becomes liable.

In this case, the writ for $9,980.80 was dissolved on the face of the papers.

The second writ, for $75,000 was dissolved on issues of fact joined, on the ground that defendant did not owe the debt.

The contentions of the defendant surety company are based on the following propositions:

1st. The mill plant was realty, *and the levy of the writs did not remove the plaintiff here from the possession of its plant;* did not dispossess and did not authorize the sheriff to dispossess the plaintiff of *any lands or tenements.* (Rev. Stat., Sec. 1651.)

Consequently, these writs did not prevent the plaintiff *from going on in its business as usual, if financially able to do so*, and therefore the levy of the writs *did not cause the interruption of plaintiff's business.*

2dl. The levy of the writs on the *personal property* of plaiintiff, to wit: 3,000,000 feet of logs in the boom pen and over 5,000,000 feet of manufactured lumber, the product of its mills—substantially all the means and *assets and stock in trade—the plaintiff owned, did not cause the interruption of the plaintiff's business*, and the latter was not a *consequence* of the levy on such personal property.

3dl. *That the cause of interruption of plaintiff's business was its financial inability to continue in business after such writs were levied; that the cause of that cause was not the writs, but was the plaintiff's want of means capitall and credit* (after all its assets had been taken away ffrom it by the levies and seizures) on which to do do business.

4tlh. That *consequently* the rule of measure of damages for which the defendant company is liable, if liable at all, *is the one applicable* to seizure and taking away personal property, to wit: if the property is not returned, *its value* and legal interest thereon. If the property is returned, *the injury done to it, if any, and interest on its value during the time it is detained, or the owner has lost the use of it.*

1. Plaintiff concedes the correctness of the 1st of above contentions of defendant, to wit: that the effect of the levy of the writs was not to physically dispossess it of its mill plant.

2. Plaintiff also concedes it to be a fact that it could have continued in business if it had had other req-

uisite means and capital, after the writs were levied, but it did not have such means.

It is apparent that the real issue of law involved on this branch of the case is this, to wit: "Was it the duty of plaintiff, imposed by law, to have had cash in bank, securities, or other property, *not levied on*, to enable it to continue in business

The argument comes to this: if an improper attachment levy takes away *all the property and means a business house has of continuing in business*, yet it is not the proximate cause of the interruption of its business, because it ought to have other, invisible means—money in bank, or securities in a safe deposit company, with which to buy a new stock of goods or raw materials for the factory.

That the wrong doer or attaching creditor did not *contemplate any damages* from interruption of business, because he had the right to presume the defendant in attachment had ample means, *not attached*, with which to continue its business.

Certainly, the defendant's contention is contrary to general experience. It is commonly understood in the business world that one's capital and stock in trade in his business is relied upon to enable him to continue in business; and if this is swept away by fire or storm, or other misfortune, he must go out of business; and if he owes debts, is insolvent and a bankrupt. We have found no case that supports defendant's contention, but several directly to the contrary.

In *Illinois Central Railroad Company vs. Cobb*, 64 Ill., 128-142, the suit involved damages for *non-delivery of personal property bought and paid for*, and it was contended that the plaintiff should have gone into the market and purchased other like personal property.

Answering this contention, the Court said: "*It would be very unreasonable* to require one who has *bought and paid for an article to have money in his pockets with which to buy a second article, in case of non-delivery of the first.*" Citing *Middlekouf vs. Smith*, I Md., 329 (to which we have not had access).

In *Dewey vs. Flitner*, 118 Mass., 131, the Court said: "A loss through deprivation of means of protection is *proximate and is a question of fact.*"

In *Watson vs. Sutherland*, 5 Wall., 74; and *North vs. Peters*, 138 U. S., 271, defendant's contention was overruled.

Before many law books were written, a renowned writer said:

"*You take my life when you do take the means whereby I live.*"

Loss of financial ability by a wrongful act ought to be as good a cause of action, as loss of physical ability. If a railroad company is sued by a passenger for damages for breaking his leg, whereby he is unable to do business, a plea that you have not necessarily suffered any damages because you ought to have bought another leg, would be nonsense.

If A. by a blow knocks the breath out of B., A. cannot reply: "You ought to have been able to breathe in some other way."

If A. is under contract with B. to construct a machine and furnish materials which he has paid for, and C. unjustly seizes such materials and carries them away, and A. sues C. for damages, including loss sustained by not completing his contract, can C. successfully plead: "You ought to have bought other materials and completed your contract with B." And would not A.'s reply: "I did not have the means to do so," be good?

A REVIEW OF SOME CASES CITED BY JUDGE SHELBY TO SUSTAIN THE CONTENTION THAT THE MEASURE OF DAMAGES IN THE CASE AT BAR IS THE INTEREST ON THE VALUE OF THE LOGS AND LUMBER LEVIED ON DURING THE PERIOD THEY WERE DETAINED FROM PLAINTIFF'S POSSESSION.

Coulson vs. Bank, 4th C. C. A., is cited.

The facts in that case were that a *flock of goats* were taken under a writ of attachment, and the rule was applied that the damage was the interest on the value of the goats while detained. Why? *Because that was all the damages the plaintiff could possibly have sustained.* (We doubt that he was entitled to any but nominal damages, because the possession and use of the goats *were of no value.*)

In that case, the Court relied on *Bates vs. Clark*, 95 U. S., 204, in which Army officers were sued for damages for illegal seizing of whisky, brought into Indian country. *The whisky was returned to the owner shortly after its seizure and before the suit brought.* The opinion states that the plaintiffs "*were doing a general mercantile business.*" The case, as reported, does not show that the seizure had any tendency whatever to injure plaintiff's business. The element of interruption of business was not involved, and from all that appears in the report of the case, plaintiff's business went on as usual, not only as to all other kinds of merchandise than whisky, but as to whisky too. It does not appear that any loss in selling whisky was suffered because of the seizure of this particular lot of whisky.

The Court held, the rule of damages was: "*the difference* between the value of the goods so seized at the place where they were taken and the place where they were returned to the owners."

Why? Because that was all the damages proved, or susceptible of proof. Nothing whatever is said in the case about "interest on the value of property detained."

It was a case of ordinary trespass at common law. Neither of the above cases have any application to the case at bar, for there was *no interruption of any business or loss of profits therein.*

Vance vs. W. A. Vandercoock Company, 170 U.S., 468, is cited.

That was an action of trover. The plaintiff was a citizen of California, doing the business *in that state of selling wines and brandies.*

It had shipped to South Carolina wines and brandies of the value of $1,000, which were seized and taken from a railroad depot by some officers of that state claiming the right so to do under its dispensary laws.

There was no pretense in that case that the plaintiff's general business in California *was impaired in any way much less interrupted for a moment.*

This Court held that the question of damages was one of local law and said: "The Courts of South Carolina as we have seen, have held that in an *action of trover, consequential damages* are not recoverable, and have also held that in the action of claim and delivery, damages for the detention must have respect to the property and to the direct injury arising from the detention."

True, plaintiff claimed it was a malicious trespass and that the detention of sixty-eight packages of wine had "*greatly injured its lawful trade and business* with the citizens and residents of the state of South Carolina."

Plainly that case can in no way control the one at bar, where its entire assets were seized and its business entirely destroyed.

It is equally plain that no *consequential damages could* have been proven in that case with any reasonable degree of certainty, to wit: to what extent such seizure lessened the plaintiff's trade in South Carolina, for that was all that was claimed. This Court in that case cites *Conard vs. Pacific Insurance Company*, 6th Pet., 262.

In that case the marshal had levied an execution at law on the teas of plaintiff, to satisfy a debt of an execution defendant. The goods so levied on had no connection with any established business. This Court in that case said: "that plaintiffs were *entitled to recover such damages only as they had proved themselves entitled to on account of the actual injury sustained by the seizure and detention of the goods and in ascertaining what those damages were* he [judge below] directed them that the plaintiff had a right to recover the value of the goods (teas) at the time of the levy, *with interest* from the expiration of the usual credit on extensive sales." Id. 282.

Plainly, in that case the Court adopted the rule that plaintiffs could recover all the damages they could prove. The question of loss of profits by the interruption of business was not involved in that case.

The case of *North vs. Peters*, 138 U. S., 271, and *Watosn vs. Sutherland*, 5th Wall., 74, are cited by Judge Shelby.

In the first of those cases, an attachment had been levied on goods owned by P., based on a debt against L. and *other attachments were threatened.* The Court enjoined the sheriff from enforcing the writs. The Court based its jurisdiction on the ground that the remedy at law, in an action of trespass or replevin, was not as *"complete, prompt, and efficient" as an injunction to*

prevent the injury; and that "*it would be extremely difficult to ascertain or estimate* the pecuniary injury the appellee would sustain." Id. 281.

The appellee had *recently purchased* the stock of goods from L. It does not appear from the report of the case that the complainant, or appellee, had *established and maintained such a permanent business* (as a retail merchant) as to enable future profits to be estimated *with reasonable certainty by evidence of his books of past profits* Indeed the report of the case shows the contrary, and that it would have been "*extremely difficult*" to ascertain such damages in a suit at law.

There could be no presumption that Peters, the purchaser of the goods from L., would be able to maintain as profitable a business as L., the seller, had. Indeed, the case shows that from Peters' old age, want of means, he could not do so. Besides, the case, as reported, does not state that L. had a profitable business.

Another element in the case was *that the goods were of a perishable nature.*

Another was the multiplicity of suits by the several defendants in attachments against the sheriff.

The case falls far short of being a direct authority for the defendant at bar, to exempt it from liability for damages from the interruption of business, under the condition of its bond.

In the case of *Watson vs. Sutherland*, 5th Wall., 74, the marshal was enjoined from selling on final process *fieri facias* a stock of goods recently purchased by the complainant, who owned the goods and was not the execution debtor. Jurisdiction was based upon the same grounds as in *North vs. Peters*, supra, *i. e.*, that the remedy at law against the marshal was not *as speedy,efficient and complete as could be afforded by an injunction.*

This Court, in stating that the remedy at law would be inadequate, applied the rule of damages applicable to the seizure and detention of personal property, and cites *Conard vs. Pacific Insurance Company*, 6th Peters, 272-282, for a definition of the rule.

The Court, also, in passing, employes these words: "*Loss of trade, destruction of credit and failure of business prospects, are* collateral or *consequential* damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law."

"Any harsher rule would interfere to prevent the assertion of rights honestly entertained and which should be judicially investigated and settled." Id. 79.

The report of the case states that complainant alleged he was a "young man, recently engaged on his own account in merchandizing and had succeeded in establishing a *profitable trade*," that his stock was "*purchased for the business of the current season, and not paid for.*

Id. 75.

The answer shows complainant purchased this stock of goods on the 27th day of October, 1862, and as the case was decided in the Supreme Court in December, 1866, the levy must have been made soon after the purchase of the stock.

It was impossible, therefore, that the complainant had built up and maintained *for any length of time, an established business of such a character as to bring the case within the rule that interruption of an established business* by a wrongful act, renders the wrong doer liable for loss of profits, where they can be proven with reasonable certainty.

For statement of such general rule, see 1 Sedgwick on Damages, Sec. 182.

All that is decided in Watson vs. Sutherland, and in *North vs. Peters*, supra, is that in those particular cases *owing to their special facts and circumstances*, the rule of damages for the seizure and *detention of personal property applied, because of the uncertainty of proving any greater damages.* The Court did not disapprove of the rule that where loss of profits of an established and interrupted business can be proven with reasonable certainty, and were caused by the *wrongful act*, they are recoverable. The two elements must co-exist: *reasonable certainty of proof* of the damages, and they must be caused by the wrongful act or by a consequence of it.

I Sedgwick, Sec. 182, text and cases cited.

In *Chapman vs. Kirby*, 49 Ill, 211-219, the opinion of Justice Walker states the law on the subject. Also, *French vs. Connecticut R. L. Co.*, 145 Mass., 261, where "the defendant obstructed a river, as *consequence of which the plaintiff lost custom* at his hotel on the bank. It was held that he could recover compensation for the diminution in his business and profits."

I Sedgwick, Sec. 182, text p. 266.

[Note—*Watson vs. Sutherland* and *North vs. Peters* are both authority to the point that *the law did not require the Bucki Company to own or control other means not levied on with which to buy logs and continue in business.* For the contention was made in those cases that the stocks of goods seized consisted of articles that could have been *easily bought in the market.* 5 Wall., 76.]

And the Court mentions in its opinion in each case that *the owner of the goods did not have the means to buy other goods.*

This certainly destroys the theory of the defendant company that it is not liable because it could not have

contemplated that the Bucki Company did not have means not levied on with which to continue in business, notwithstanding the attachments.

It is submitted that the cases cited by Judge Shelby do not support his conclusion that in the case at bar the defendant company is not liable to damages caused by interruption of plaintiff's business, because too remote and consequential. Judge Shelby did not pretend that this element of damages was not susceptible of proof with all reasonable certainty.

What the learned judge said in respect to the condition of the bond, not including *vindictive* damages, as in case of an issue of malicious prosecution, was unnecessary to be said, for neither party made any such contention.

What we contend for is that the condition of the bond includes all *actual damages sustained in consequence of the writs*, and that the Legislature so intended.

Judge Shelby's views are here mentioned because presumably they state the views *upon this particular point* of the other two members of the Court, who affirmed in legal effect by their silence all that the Circuit Court decided, save on the subject of counsel fees.

The cases we have reviewed involved liability under *non-contract law*, while the case at bar involves liability *on contract*.

A strictly common law liability in an action of trespass is narrower than the contract liability under the condition of the defendant's bond.

The case of the "Conqueror," 166 U. S., 110, was the case of the seizure and detention of personal property, to wit: a steamboat; and this Court applied a rule of damages as follows, to wit: "The value of her *use to the owner while detained was a proper measure of damages*;

and that the books of her owner showing her earnings *prior to detention* are admissible to show *probable future earnings.*"

This Court did not hold in that case that the owner of the steamboat, after its seizure, *should have bought or leased another boat* to put in its place, and restrict the damages to interest on the value of the "Conqueror" while the owner was deprived of the use of it. This Court recognized the distinction where the *personal property, in* connection with other property, has by its use an earning capacity.

Now, if the effect of seizing under these attachments *all available assets* of the plaintiff, whereby as a consequence of such seizure it was financially disabled to buy logs to continue its business, why has it not been deprived of the use of the mill plant as a direct result of the seizure of such assets? the same as if the mill plant itself had been seized and taken from the possession of the plaintiff; and why should not the same rule of damages be applied as was applied to the case of the "Conqueror?"

The ground of recovery of profits lost is *the inability to earn them, caused by the wrongful act* of the wrong doer.

If this inability is the proximate and consequential effect of the wrongful act, then that relation of cause and effect is established upon which damages are awarded. In the case at bar, the fact that the seizure did not operate to remove plaintiff from *possession of its realty and the mills* located on it, cannot be material, provided the effect of seizure of its logs and manufactured product constituting its stock in trade *and entire means of doing business* prevented plaintiff from operating its mills.

All parties concerned in wrongfully issuing a statutory attachment are in *the position of and liable as tres passers as soon as the attachment is dissolved.*

They are liable in damages sustained by such trespass, though they acted in good faith and in the belief they were entitled to the writ

Handley vs. Chadwick, 109 Ala. 505.
S. C. 19 So Rep., 845.
86 Fed., 223.
28 New York, 666.
27 Mich., 234.
1 Sedgwick, Sec. 59.

Such parties are always liable as trespassers in all cases where the writ has *no judicial sanction, but is issued by a ministerial officer*, when the writ is set aside on the ground that the parties were not by law entitled to it.

Id.

The Clerk of the Court who issued these writs acted purely in a ministerial capacity. (Revised Statutes of Florida, Secs. 1635, 1637, 1641, 1642, 1646. 21 Florida. 189, showing that the clerk issues the writ.)

173 U. S., 85, 95, 96.

The law declares to a creditor "you take out an attachment at your peril. You must have a just demand and some one of the statutory grounds for an attachment, otherwise you will be a trespasser."

And for such a trespass the statute imposes a more extensive liability than that of a common law naked trespasser.

If the creditor, with an execution at law on a final judgment against Smith, had caused it to be levied upon these properties of the plaintiff, his liability would have been that of a trespasser at common law.

In such case, the trespasser would not be liable in *a common law action* to pay the *costs incurred by the owner in other litigation against the trespasser to regain*

possession of the property seized. In the case at bar the statute expressly imposes *such costs on the attaching creditor.* (Rev. Stat. of Fla., Sec. 1646.)

The statute imposes on the creditor the duty to give a bond *agreeing to pay all such costs and all damages sustained in consequence of improperly issuing the writ*; and the bond must be executed by the attaching creditor or his agent, thereby rendering him liable. The penalty of the bond must be *double* the amount of the debt.

The Supreme Court of Florida has construed this statute and the condition of the bond in conformity to the statute *to include costs and attorneys' fees incurred* in obtaining a dissolution of the attachments and other expenses.

Gonzales vs.Tobacco Co., 41 Fla., 471.

For a common law trespass, *there is no such liability.*

And under like statutes in other states and bonds in compliance therewith, the state courts have almost uniformly ruled that the condition of the bond includes not only costs, but attorneys' fees and cost of attendance, and traveling expenses of defendant to obtain the dissolution of the attachment.

In *Gonzales vs. DeFuniak Havana Tobacco Co.*, 41 Fla., 471, the Court in its second syllabus declares as follows: "*Attorneys' fees and other expenses incurred in relation to the attachment or in procuring its dissolution are properly allowed as elements of damage in actions upon attachment bonds,*" citing numerous cases.

Also *Wittich vs. O'Neal*, 22 Fla., 592, in a suit on injunction bond, allowing same element of damages.

Certainly the Supreme Court of Florida has held that the condition of the attachment bond does include

elements of damages for which a naked trespasser is not liable in a common law action of trespass. (41 Fla., 477, supra and numerous cases to same effect.)

The Court of Appeals in this case followed the Supreme Court of Florida in respect to *the elements of damages embraced within the condition of the bond,* so far as the Florida Court has expressed itself. (*L. Bucki and Son Lumber Company vs. Fidelity and Deposit Company,* 48 C. C. A., 436.)

Also reported in 109 Fed. Rep., 393.

And held it was a question of local law which the Federal Courts would follow. (Id.)

"Attachment is essentially the creature of the written law. *Hence, but little assistance can be obtained* in discussing this peculiar remedy by looking beyond the *statute by which it is authorized.* The force and effect of attachment laws can only be tested by the principles of statutory construction." (Id 445, citing Wade on Attachments, Sec. 2; Drake on Attachments, 5th Ed., Section 8.)

"In its nature *this remedy* is certainly anomalous. As it exists under the custom of London, *it has hardly any feature of a common law proceeding.* In these [just mentioned] and other respects the proceeding under the custom has an individuality *entirely foreign to the common law.* The peculiar features have, in the main, been preserved in its more enlarged and diversified development in this country." (Drake on Attachments, Sec. 4.)

And this Court has recently decided that when no Federal element is involved, the elements of damages recoverable on an injunction and attachmnt bond *are questions of local law.*

Tullock vs. Mulvane, 184 U. S., 497.

Railroad Co. vs. Elliott, 184 U. S., 530.

The bonds in question were contracts provided for *and required by the local statute of Florida. They could never have existed but for such statute.* They were executed and filed in actions commenced in the state court (afterwards removed to the Federal Court). The construction of the condition of the bond involves no Federal right or Federal element. If the Federal Court was not bound by the construction given by the local courts, it could not construe the condition of the bond differently. And on points or elements on which the local court has not spoken, the Federal Court is bound to give to the words of the bond such meaning as the Legislature evidently intended, and to effectuate its objects and purposes in requiring such a bond from an attaching creditor.

It is a *remedial statute*, and the condition of the bond *being fixed by the statute*, it should under the settled rule in such case be *liberally construed.* At least, it should be given its natural construction and the well-understood meaning of the words employed should be applied to effectuate the legitimate intent.

Even "*where a statute requiring a bond to be given is silent as to the condition thereof, the condition is to be found in the object and intention of the statute*" and the sureties thereon are liable accordingly.

Mitchell vs. Duncan, 7 Fla., 13.

Attachment laws will be liberally construed: "*whenever by so doing the cause of justice may be advanced.*"

Hardee Co. vs. Langford, 6 Fla., 23.

"In giving a construction to a statute, the Court *must* consider its policy, *and so interpret it as to effectuate the design of the Legislature.*"

1 Fla., 226-232.

"Consequential," as applied to damages, is both a technical and a popular term, and the statute must be

so construed as to give its technical and popular meaning effect.

39 Fla., 25.

"The undertaking (bond) is an original, independent compact on the part of the sureties and must be construed in connection with the statute which authorizes it."

1 Shinn on Attachment, Sec. 173, p. 294; and
Frankel vs. Stern, 44 Cal., 168.

The bond is in every sense *an indemnity bond* and should be construed accordingly.

1 Shinn on Attachment, Section 153.

"The manifest object of the statutes in requiring a person to give a bond before he can have a process for the seizure of his debtor's effects *is to enable the said debtor to have a more certain and effective remedy in the event of the process proving to have been wrongfully* * * * *sued out, than he would have if his only recourse were to a common law action.*"

1 Shinn on Attachments, 153.

"The damages occasioned by the attachment arise *ex contractu*, and may be set off in a suit by the attachment plaintiff" for a debt.

1 Shinn on Attachments, Sec. 182, p. 308.
Citing *Plunkett vs. Sauer*, 101 Penn. St. 356.
Halfpenny vs. Bell, 82 Penn. St., 128, where damages for closing a factory were set off.

The Legislature is presumed to have known the meaning of the words "proximate," "direct," and "consequential," as applied to damages. It chose to use the word "consequence," and has ordained that the obligor on the

bond shall be liable for all damages the defendant sustains in consequence of the attachment. That is, *all actual and compensatory damages*, as dintinguished from vindictive, on account of malice.

Compensatory and actual damages are identical and they should be commensurate with the injury suffered.

Birdsdale vs. Cooledge 93 U. S., 64.
6 Wall., 99.
91 U. S., 298.

One general rule of damages is to award such damages as will make the injured party whole, and place him in the position he would have been in if the injury had not happened.

When this statute was passed, the Legislature is presumed to have known that attachment laws were liable to great abuse, and are sometimes resorted to when there is no proper grounds therefor; and the Legislature intended, by requiring the bond conditioned as required, that its obligors should pay such damages as would make the injured defendant whole and place him *in statu quo*. Hence it made him liable for all damages sustained in consequence of improperly issuing the writ and thereby imposed consequential damages, so far as the latter are distinguishable from "proximate" or "direct." The statute says "*all damages sustained.*" How? By "improperly" issuing the writ. *Not all damages sustained* on condition that the writ is issued maliciously, because vindictive damages are *not sustained by the defendant*, but are given for punishment. All damages sustained, necessarily from the meaning of the words, include all actual and compensatory damages sustained in consequence of the writs.

The only question in each case is, what is the amount and elements of damages sustained as a consequence of the writs?

The Legislature has not limited the damages to such damage as the "Court may award." It has vested in the Courts no discretion on the subject.

Unless violence is done to the language employed and its natural and legal meaning is wrested from it, the obligors *are liable to consequential damages to the extent of all actual and compensatory damages* that can be traced to the writs.

What do consequential damages include?

"All consequential damages are not remote."

But consequential damages may even include remote damages.

1 Sedgwick on Damages, Sec. 110.

"Consequential loss may be one step, or a dozen, in the line of causation from the wrong."

Id., Sec. 111.

Consequential damages include all damages that can be reasonably attributed to the injury complained of though the wrong doer *did not expect or contemplate* such damages.

1 Sedgw., Sec. 112, containing many illustrations

Eten vs. Luyster, 60 Y. Y., 252.

1 Sedgwick, Sec. 125, containing illustrations.

"*Where the plaintiff has been deprived of machinery or other means of carrying on his business, he may recover for loss of business if such loss naturally followed.*"

1 Sedgwick, Sec. 133.

"Thus, for *deprivation* of machinery evidently to be used in a mill, the owner may recover damages caused by the loss of the use of the mill."

Id.

"For instance, wages paid in excess of the work they were able to do."

Id. and *Waters ve. Towers*, 8 Ex. Rep., 401.
130 U. S., 611.
Joly vs. Single, 16 Wis., 280.

"*As for loss of stock on hand*, rendered useless for lack of the machine."

1 Sedgwick, Sec. 133.
Railroad Co. vs. Pritchard, 77 Ga., 412.
VonWinkle vs. Wilkins, 81 Ga.
Sitton vs. MacDonald, 25 S. C., 68.

"Where the plaintiff's vessel is injured by collision, he may recover the amount paid out to the crew in wages during the period of detention."

1 Sedgwick, Sec. 133.
R. R. Co. vs. Mayor, 36 Fed., 716.

The general rule is stated by Shinn as follows: "The attachment defendant may in an action on the bond recover such costs and damages as he sustained *in consequence of such wrongful attachment, by being deprived of the use of his property, together with costs and expenses.*

1 Shinn on Attachment, Sec. 184.

No exception, we think, can be taken as to the correctness of said statement of the general rule. Under it the only question in the case at bar *was the deprivation of the use of the mills a consequence* of the deprivation of the use of its lumber and logs.

In *Etheridge vs. Sperry*, 139 U. S., 277, speaking of the disastrous effects of attachment proceedings, this Court said: *"In ninety-nine cases out of a hundred, the taking possession by a creditor results in closing the business and turning the debtor out of employment."*

It is not untenable to conclude that when the Florida Legislature enacted these attachment laws, it had in view

the well known fact that an attachment levied on all the property of a merchant or manufacturer which he uses in his business generally resulted in destroying the defendant's business, and exacted the broad condition of a bond, to indemnify the defendant against such a disaster.

The Legislature obviously contemplated that very heavy damages might be a *consequence* of such writ, otherwise it would not have exacted a *bond in double the amount* of money for which the attachment was taken out.

It is inconceivable that such a penalty in the bond would have been exacted if the damages could be in the one case only *the value of the personal property taken and never returned, and interest thereon during detention*, and in the other case where the property is returned, only interest on the value during detention.

For the sheriff is authorized to attach only property enough to "*satisfy the debt or sum demanded, with costs.*"

R. S., Sec. 1648.

And it is inconceivable that the Legislature ever contemplated that the amount of interest on the value of the property taken and returned, would ever amount to the sum demanded. In short, if the narrow construction contended for is correct, there could have been no useful object or purpose in exacting security for double the debt; and it will be assumed the Legislature did have some useful purpose in view in exacting such security or indemnity.

BALANCING DISASTERS.

Suppose we arrive at a construction of the condition of the bond *by balancing disaster* of creditor and debtor.

Suppose we say in behalf of the attaching creditor that if such condition of the bond is construed to include all damages resulting from interruption of the business of defendant, *it would deter the creditor from resorting to an attachment*, however well founded his claim or grounds of the attachment.

Well, is it not better and wiser in a given case, on a good claim and on good grounds of an attachment that *one man should be deterred from obtaining an attachment lien as security for his claim*, rather than that in another case, on an unfounded claim and on unfounded grounds, though wrongfully asserted, another man should be encouraged by a construction of the bond to exclude damages resulting from interruption of business, to take out an attachment which will result in the destruction of such business and ruin of defendant, and give him no indemnity or security for his ruin?

The argument is altogether in favor of such construction of the bond as will include damages for interruption or destruction of defendant's business. For on the one hand, by not resorting to an attachment, the creditor *may lose the particular debt by not obtaining a lien as security.* On the other, the defendant or debtor is absolutely ruined and *loses everything he owns*, in case the creditor acts in good faith and malice is not present.

As a choice of evils, the Legislature has chosen the last, and has exacted a bond broad enough in ist terms without *enlarging upon the natural or legal meaning of the language employed*, to include all damages from interruption or destruction of business.

Such considerations should, we submit, persuade the Court to adopt that construction which will protect the defendant *who is equally as innocent as the attaching creditor. And as in all cases of balancing disaster, where two parties are equally innocent, and a loss is sustained, he should bear all the loss whose acts have caused it.*

For the above reason, the authorities holding losses from interruption of business are damages within the condition of the bond, are entitled to the highest respect.

SOME CASES WHERE LOSS OF PROFITS BY INTERRUPTION OF BUSINESS AND LIKE DAMAGES CAUSED BY THE WRITS WERE HELD PROPER ELEMENTS OF DAMAGES IN A SUIT ON THE BOND, AND THE MODE OF PROOF SPECIFIED.

Pollack vs. Gantt, 69 Ala., 373.
S. C., 44 Am., 519.

"One who has been prevented from completing work he had undertaken to do by the attachment of his tools and material, may recover *consequential damages for the injury proved to be sustained.*"

1 Shinn, Sec. 188, p. 327.
Carpenter vs. Stevenson, 6 Bush (Ky.), 259.

And where merchandise in one's business is attached, "the rule that the measure of damages is the difference between the value of the property when seized and the value at the date of the trial *is not applicable to such a case.*"

1 Shinn, Sec. 188, p. 327.
Knapp, Spaulding & Co. vs. Barnard, 78 Iowa 347.; s. c. 43 N. W., 197.

Thus sustaining our contention that the cases of *Watson vs. Sutherland*, 5 Wall., and *North vs. Peters*, 138 U. S., supra, have no application to suits on attachment bonds.

"In Mississippi it is said that loss of business caused by the seizure of goods may be a factor in computing the damages *when the same are shown as a matter of fact, and not by the opinion or estimate of witnesses.*"

1 Shinn, Sec. 190, p. 342.
Marqueze vs. Southeimer 59 Miss., 430.
Byrne vs. Gardner, 33 La. Ann. 6.

Injuries to business are recoverable and were allowed in the following cases:

Flournoy vs. Lyon, 70 Ala., 308.
Oberne vs. Gaylord, 13 Ill. App., 30.
Mayer vs. Duke, 72 Texas, 445.

"Loss through deprivation of means of protection to person or property" is not too remote.

1 Sedgwick on Dam., Sec. 134., and illustrative cases cited.

This is applicable in principle to case at bar, for deprivation of the use of all the lumber plaintiff owned, disabled it to protect its right to operate the mills.

And the decisions of the Supreme Court of Florida, and other cases cited, establish that the rule of damages in a case of a trespass *at common law has no application* and does not control the measure of damages under the covenant in the condition of this bond.

The loss of the use of plaintiff's mills by being deprived of the means of running them, is certainly no more remote, nor so much so, as attorneys' fees and other expenses incurred in obtaining a dissolution of the attachment. The incurring of liability for such attorneys' fees is a more remote and unexpected consequence of the writs than inability to run the mill when all plaintiff's property was levied on.

In view of what the Supreme Court of Florida has decided as an element of damages in a suit on the bond, following the rule in other states allowing attorneys' fees, expenses traveling and hotel bills, in obtaining a restoration of the property, it cannot be doubted that if the question was before it, it would follow those states which allow damages for interruption of business, when proven with reasonable certainty.

Justice will be better promoted by giving to the statute and condition of the bond this natural meaning and thereby give a remedy to plaintiff for its losses, than by giving a narrow and restrictive meaning, and thereby leave the plaintiff no redress.

Decisions of other Courts in suits on bonds cannot furnish much aid; the language of the statute and bond is different. After all, the solution of the question depends on the construction to be given to the condition of the bond, having in view the legislative intent.

The apparent conflict in the reported cases arises from want of discrimination in respect to the facts and *nature of the property in each particular case, and the use* the defendant was making of such property.

Certainly the damages must be different if the writ is levied upon a tract of wild land, unused for any purpose than where it is levied upon a manufacturing plant, and all the crude materials and supplies for feeding the plant, and all the manufactured finished product on hand for sale, constituting all the means and assets defendant owns in the world wherewith to maintain and continue in business.

This marked distinction is indicated in *Elder vs. Kutner*, 97 Cal., 49; s. c. 32 Pacif., 563., when discussing the liability of obligor on an attachment bond in a case of a *levy on land*.

A levy upon a merchant's entire stock of goods in trade, in consequence of which his sales and entire bus-

iness are suspended, directly and necessarily causes greater damages and involves different elements of damages, than a levy upon a dwelling house and lot, where possession and use is not interrupted.

So that the cases cited in the digests and text books, declaring the rule of damages to be applied in case of a levy of an attachment on land, or articles of personal property not connected with an *established business*, are inapplicable to the case at bar.

The Appellate Court in this case found that the attachments had the *"gravest effect"* and *"serious effect on the business of the defendant."*

48 C. C. A., 439.

And for such reasons, among others, that Court held attorneys' fees were proper elements of damages for services in getting the attachment dissolved. We submit that the damages resulting from the mills being idle before the attachments were dissolved, are no more remote than such attorneys' fees.

In 94 U. S., 470, the Court said: "When there is no intermediate efficient cause, the original wrong must be considered as reaching the effect, and proximate to it." Refinements beyond this rule "are too remote for rules of social conduct."

Id. 476.

Insurance Company vs. Boon, 95 U. S., 117-132.

The relation of cause and effect is for the jury.

Id. and 27 Fla., 116, and cases cited.

And in *Derry vs. Flitner*, 118 Mass., 131, the Court said: "A loss through deprivation of means of protection is proximate and is a question of fact."

Therefore, under the above established rules of law, there was *no intermediate efficient cause* and the original wrong of isuing and levying the writs was the *direct* and efficient cause of the loss of the use of the mills and in the language of the statute and of the bond this damage was "damages which the defendant may sustain in consequence of the plaintiff's *improperly suing out* said attachment." (R. S., 1646.)

See bond, Rec. p. 9.

DAMAGES CONTEMPLATED.

It seems to us incontestible that the attaching creditor knew, and this surety knew, that when their attachments were levied, the plaintiff's business *would be immediatey interrupted*, and that such interuption would continue *for an indefinite time*, to wit: *until the lien of the attachments* was finally removed.

The attaching creditor had its principal office in the city of Jacksonville where the plaintiff's mill plant was located. It was daily delivering logs into plaintiff's boom, and having daily business transactions with the plaintiff. The testimony establishes that it knew plaintiff had a large quantity of logs in its boom, for it had itself delivered them there; and it knew that plaintiff *had several times the quantity* of manufacturd product on hand at the mills that it usually had on hand. And it knew the reason of such large accumulation of manufactured product on plaintiff's yards and docks was caused by the inability of purchasers of such product to charter vessels to remove such product; and that plaintiff could not obtain pay for such product until it was loaded on vessels at its docks, for such was a term in the contract with the purchasers, and *this attaching creditor knew it*.

This attaching creditor also knew that the plaintiff had *for several months borne the expense* of buying logs and sawing them , and piling up the finished product in its yards, *without receiving any proceeds from the sale of lumber,* because of the scarcity of vessels to take it to the purchasers; *and that thereby all its accumulations of ready cash in its business had been exhausted.* The attaching creditor knew all these things and those above enumerated facts, *because its officers in the witness box admitted they knew them.* With the knowledge of all such facts, *they struck this direct blow at plaintiff's business, and they absolutely knew that with these attachments* resting on the properties levied on, *it was impossible from want of financial means, for plaintiff to continue in business.*

It is therefore certain that the attaching creditor, The Atlantic Lumber Company, not only contemplated, *but absolutely knew, that these attachments would inevitably cause the total interrupting,* as it did, of plaintiff's business, as long as they could keep these attachment liens for $85,000 upon its properties.

CONTEMPLATION OF DAMAGES BY THE SURETY COMPANY.

Without now insisting that the surety company is chargeable with all the knowledge of the disastrous effects these attachments would have, which the creditor possessed, it is very certain that it did not execute bonds *conditioned as these were* in the penal sum of $170,000 *without making effective inquiry* into its liability, assumed by becoming such surety. It is well known that no business man goes upon such a bond without reasonably accurate knowledge of the nature of the property

to be attached, and its quantity and value, *and the use the owner is making of it.* He naturally inquires, and we think he is bound to inquire, as to the effect the levy of the writs will have on the defendant's business. *The condition of the bond itself* informed the surety company that plaintiff company was a manufacturer of lumber, and *that the writ was to be levied on the lands and tenements, goods and chattels* of the plaintiff company.

See bond, Rec. p. 9.

The defendant had officers in the city of Jacksonville, Florida, where plaintiff's mills were located. This surety company, therefore, is chargeable with knowledge that the goods and chattels of plaintiff, as a lumber company, *consisted of logs and manufactured product,* and that its lands and tenements consisted of its mill plant. Its local officers are, therefore, chargeable with knowledge that the levy of attachments for $85,000 upon such properties would naturally cause a suspension of business, if not its destruction. *Every business man knows it for common sense so teaches.* This surety company knew the nature of the damages that those writs would inflict, and that among those damages would be the loss of the use of its mill for an indefinite period of time; and their officers knew the condition of the bond.

They *contemplated the payment* of such damages within the condition of their bond, and *they knew* the effect of the attachments would cause the loss of all profits of plaintiff's business while such attachments remained on its properties.

It cannot, therefore, be correctly said that the loss of profits was "*incidental*" or a *collateral consequence* of these writs. *It was the direct result of the blow of these writs.*

ADDITIONAL AUTHORITIES SUPPORTING THIS ASSIGNMENT OF ERROR.

In *Y. Y., etc., Mining Co. vs. Fraser*, 130 U. S., 611, one question involved was the liability of a contractor to damages for a failure to erect a new silver mill with efficient machinery at the time agreed upon. In accordance with the familiar rule, it was held, the contractor was not liable to loss of profits expected to have been made during the time lost by non-completion of the mill, because in such case there can be no reasonably certain proof like that of past profits of *an established business*, by which to estimate the profits.

But the Court did hold in that case, that the contractor was liable for the rental value of the mill, and in the absence of other evidence, ruled that "the legal rate of interest upon the cost of the mill may be taken by a jury as its fair rental value."

And this Court, in that case, also ruled that "in estimating damages resulting from the stoppage of a mill, the jury may take into consideration the wages of men thrown out of work while the mill was idle," when the employer was *bound to pay them while so idle*.

In the case at bar, the Circuit Court applied this rule as to salaried employees of the plaintiff, and the Appellate Court sustained it.

This was on the theory that *in consequence* of plaintiff's inability to run the mill, it suffered the loss of the value of the services of the employees, which he had to pay. But the inability to run the mill was a *financial inability*, caused by the writs.

If such inability entitled plaintiff to recover of the surety for the *loss of the use of the services* of its employees, represented by the amount of their salaries

paid, why should not plaintiff recover of the surety for the loss of the use of its mills, represented by the *amount of profits* which the jury could find it might have made, if the attachments had not issued?

If the loss of the use of the services of the employees was the proximate effect of the attachments, as the Court ruled, then it logically follows that the loss of the use of the mills was the proximate effect of the attachments, and in each case it is for the jury to decide the amount of such loss.

The ruling now under discussion, of the Courts below, followed that of this Court in 130 U. S., pp. 611-623.

Certain it is that this Court held, in 130 U. S., 623, that the loss of the use of the services of employees "while the mill was idle" was an element of damages for which the contractor was liable.

And in that case, *the breach of the contract* to have the mill ready for use at a fixed time, was held the proximate cause of the mill and the employees being idle, and of the loss sustained. In that case, such loss of the use of the services of the idle men was deemed to have been in contemplation of the parties.

The loss can not be said to have been more in the contemplation of the parties in the case of 130 U. S., supra, than the loss in the case at bar was in contemplation of the parties.

We confess we are unable to see any distinction in the case at bar, from the loss of the services of the salaried employees, while plaintiff was unable to operate its mills, and the loss of the use *of the mill itself*, and the profits arising therefrom. If the former was caused by the attachments, the latter was.

If anything, *the former is more remote than the latter*. The loss of the men's services was a *consequence*

of the inability to operate the mills, and the inability to operate the mills and earn the usual profit, was a consequence of the attachments. The former was one step more remote than the latter in the line of causation.

RENTAL VALUE OR ITS EQUIVALENT BY WAY OF LEGAL INTEREST ON THE COST OF THE PLANT DENIED THE PLAINTIFF.

Had there been no other evidence (which there was) of the damages caused by the loss of the use of the mill, plaintiff was entitled to the rental value, to be arrived at by giving legal interest on the cost of the plant while it remained idle.

The cost of the plant was proven to exceed $130,000. Rec. pp. 82-96.

The rulings and actions of the Court below deprived the plaintiff from recovering this rental value, because the trial judge, as before shown, refused to submit to the jury the question *whether or not the writs of attachment caused the mill plant to remain idle;* and the Appellate Court, by its silence, affirmed that refusal.

In *Dushane vs. Bendict*, 120 U. S., 631, a vendor of rags *warranted them to be clean rags*, suitable to be manufactured into paper. The vendee was a manufacturer of paper. It turned out that the rags were infected with smallpox, which broke out among the vendee's employees, causing him to run his mill short-handed, in consequence of which he lost *part of the usual profits* in his business.

In an action *involving damages for a breach of the warranty*, this Court (reversing the Court below) ruled that the *smallpox caused the interruption of the vendee's*

business; that the selling of the infected rags as and for clean rags, was the proximate cause of smallpox breaking out *among his employees, and that by breach of the warranty* the vendor was liable for the loss of profits from the interruption of vendee's business.

Id., 636, 637.

In that case, *there was no issue of malice.* That element was not in the case.

The question whether or not the vendor knew the rags were infected with smallpox was made, but this does not lessen it *as authority* that for a wrongful act, causing the interruption of another's business, the wrongdoer is liable for the loss of an established business, thereby caused.

Selling impure for clean rags was an illegal, wrongful act. Taking out attachments for $85,000 was also an illegal and wrongful act.

In *Dushane vs. Bendict,* the evidence was such that the amount of the damages could not be estimated with much certainty, but this Court held it must be submitted to the jury, and that it was error not to submit it.

Id., 647.

The rule we contend for is within the reason of the case of *McAffee vs. Crofford,* 13 How., 447-455, where it was held that *wrongfully seizing* and selling of slaves of a planter *under an execution at law,* pending a growing crop of corn, subjected the wrongdoer to pay for the value *of a crop of corn that the planter might have made* if the slaves had not been taken from him.

We do not see *that the nature of the force applied,* in the absence of malice, is a material consideration.

And what is the difference between the measure of damages of breach of warranty as to quality and the breach of an indemnity bond like the bonds in this case?

If the breach of warranty of the rags rendered the obligor liable for damages for interruption of the mill, why should not a breach of the bonds result in the same liability? It would seem that the liability is less questionable on the bonds, because the obligors have expressly covenanted to pay consequential damages.

In *Allison vs. Chandler*, 11 Mich., 542 (a leading case, never overruled), held, that *as plaintiff had sustained actual damages* by defendant's trespass, defendant was liable for such actual damages, though he acted innocently; that, even in case of doubt, justice requires that the loss should fall upon the defendant *who had caused the injury, and not upon the innocent plaintiff*; and the amount of the actual damages must be submitted to the jury, though it cannot be estimated with much certainty and was "*more or less a matter of opinion.*"

Id., 560-561.

That case involved damages for interruption of business.

In *Bagley vs. Smith*, 10 N. Y., 489, where one partner sued another at law for a breach of a partnership contract *by dissolving the partnership* before the time limited, held: That defendant was liable for *plaintiff's share of the profits* of the business that the firm would have made if the business of the firm *had continued to the time limited*—such profits being provable.

Suppose a surety company had given bond, conditioned to pay all damages that either partner may sustain *in consequence of the other improperly dissolving the partnership before the time limited* in the contract, would there be any doubt that such surety would be liable for the profits lost, to the same extent, as the partner who had wrongfully terminated the contract?

In *Mining Company vs. Humble*, 153 U. S., 540, it was held that the defendant for the act of wrongfully breaching a mining contract, was liable for all profits plaintiff could have made by performing the contract, which could be proved with reasonable certainty. There the objections that such profits were *too remote and were not in contemplation of defendant*, were overruled.

Id., 549, 550.

The Court there cited, and we here cite:

Howard vs. Stillwell & Bierce Manufacturing Co., 139 U. S., 199-206.

Cincinnati Gas Co. vs. Western Siemens Co., 152 U. S., 200.

In 153 U. S., supra, the Court said: "There was no mathematical certainty as to the amount of ore remaining in the mine, yet the question must go to the jury."

Id., 550.

Had the defendant in the case given bond *to pay all damages in consequence of his improperly breaching his contract*, there can be no doubt that the obligor would be liable to pay for such *profits lost by such breach*, as being within the condition of the bond and within the contemplation of such obligors.

Like illustrative cases could be indefinitely multiplied.

Their application consists in this, to wit: A breach of contract is not so aggravated a wrong as the trespass of seizing one's property under a ministerial writ of attachment to which the creditor was not entitled.

The fundamental ground on which, on breach of contract, the wrongdoer is held liable to profits lost on the *unperformed part of the contract*, is that in law he is

deemed to have *consented* to pay such damages, because he is chargeable with knowledge that such damages would ensue from the breach. And here the surety company has expressly consented to pay all damages in consequence of the wrongful act. It must be chargeable with knowledge that *some damages* would ensue, and is therefore chargeable with the knowledge of their extent and that loss of profits of plaintiff's business would ensue, because by inquiring the surety company would have learned it.

The law presumes that one who breaches a contract knows that the other party entered into it and upon its performance with the expectation of making profits, and consequently he is presumed to know that his breach deprives the other party of an opportunity to make such profits.

The defendant company is presumed to know that plaintiff was conducting its mill business with the expectation of making profits, and it is presumed to have known when it executed its bond that the levy of these writs would deprive plaintiff of the opportunity of making such profits. And he is presumed to have understood that the condition of its bond required it to pay for such profits.

The party who wrongfully breaches the contract, is liable for the expected profits, though he acted in the utmost good faith by virtue of the force of the contract. But in the case of an improper attachment the obligor on the bond has expressly *covenanted to pay all damages in consequence* of the wrongful act of his principal, though the latter acted in good faith.

We fail to see any reason why the one should be liable for profits and the other not, providing in each case the profits can be proven with reasonable certainty.

Other Attachment Cases where the suit was on an attachment bond, or a common law suit against the attach-

ing creditor for trespass, (free from malice), *and held defendant was liable for loss in business by its interruptions*

Handley vs. Chadwick, 109 Ala., 505.
S. C. 19 So. Rep., 845.
Birmingham Dry Goods Co. vs. Finley, 26 So. Rep., 138 (Ala.).
Pollock vs. Gannt, 69 Ala., 373.
S. C. 44 Am., 519.
Flournoy vs. Howe, 70 Ala., 308.
S. C. 10 So. Rep., 916.
Doll vs. Cooper, 77 Tenn. (9 Lea.), 576.
Grimes vs. Bowerman, 92 Mich., 258.
S. C. 53 N. W. 751.
Sonneborn vs. Stewart, 2 Woods, C. C. Rep., 603 604. (Reversed in 98 U. S., 187, but not *on this ground.*)
Myer vs. Foyon 34 Neb., s. c. 51 N. W. Rep., 753.
Kyd vs. Cook, 56 Neb., s. c. 76 N. W. Rep., 524, where the subject is reviewed.
Hangen vs. Hochemeister, (114 N. Y. App.); s. c. 21 N. E. Rep., 1046, 1047.
Max vs. Strous, 93 Ala., s. c. 9 So., 88.
22 Fed. Rep., 220. (Tenn.)
Kennedy vs. Meacham, 18 Fed., Rep.

VALUE OF THE USE.

All the authorities hold that *the value of the use of the property seized and taken from defendant by virtue of the writ, may be recovered in an action on the bond.*

2 Sutherland on Dam. (2d Ed.), 512.
2 Sedgwick on Dam., Sec. 682.

Now, the value of the use must vary according to the nature of the property.

In the case at bar, the value of the use to plaintiff *of its logs and timber seized,* was equal to the profits it could have made by operating its mills, for by the use of such lumber and that sawn from the logs levied on, to wit: selling it, *it could have purchased logs with the proceeds and operated its mill.* Such is the very use plaintiff would have made of its lumber, if the writs had not taken it away.

It has also been shown that *deprivation of means of doing a thing is a proximate cause,* and thus the case is brought within this general rule.

The use by any business concern of its assets is to *keep its business going.*

WHAT IS A TAKING?

This question must be answered according to the facts in each case. Even under the law of eminent domain it does not necessarily mean an actual, physical possession. Such acts as have deprived the owner of the use or of the value of the use of real estate, have been held a taking within the meaning of the law, such as the wrongful overflow of one's land. True, the levy of the writ did not remove the plaintiff from its mill plant—land, mill buildings and machinery—buh the *effect* of the levy on the personalty was the same as if it had, for by the loss of the use of the latter, the use of the former was lost. Plaintiff's rights should not be lost by the mere quibble that, technically, it was not physically removed from the mill plant.

PROPOSITION NEVER DENIED.

We submit that there is no conflict in the authorities *upon the principles* involved on these assignments of error.

As shown, there are many reported cases where it has been held that an obligor on an attachment bond, or one in a like situation as to liability, has been held liable for loss of the use of one's property and loss of *profits of an established business. We submit that there is no reported case where that principle of liability has been denied or repudiated.*

On examination, it will be found that when the Courts *have refused to apply the principle,* it was in cases *where upon the facts in the given case the losses* in the business were either incapable of proof with reasonable certainty, or, *from the nature of the case,* such losses were plainly too remote to be a consequence of the wrong done in the given case, or both uncertain and speculative and too remote.

In other words, *no Court has ever held as a universal or general principle, applicable to all cases,* that a surety on an attachment bond, or one holding a like position, could never be liable to damages arising from loss of profits of an established business, caused by the attachment.

The undoubted and long settled general rule is: "that where it clearly appears that the defendant has interrupted an established business from which the plaintiff expected to realize profits, the plaintiff should recover compensation for whatever profit *he makes it reasonably certain he would have realized.*

1 Sedgwick on Dam., Sec. 182. and numerous cases cited in the text and notes of that section.

Sedgwick, in 1st Volume, Section 127, speaking on this subject, on page 184, says: "But on the other hand, where the *cause of action is a direct blow to the credit or trade of plaintiff, the rule is otherwise.* Thus where the defendant agent of the plaintiff in error broke his contract to keep a cash account of 500 pounds to meet drafts of the plaintiff, and in consequence a draft was returned dishonored, he was held liable for the *loss of trade in G., which was consequently suspended and for loss in the general business of the plaintiff, because of his impaired credit.*" Citing the case of *Boyd vs. Fitt*, 14 Ir. C. L., 43.

We repeat, it is all a question of proximate and consequential cause, or a remote cause, in each particular case, and this is for the jury in all cases, unless the injury is so obviously remote that there could *not* be two opinions on the subject.

DURATION OF THE PERIOD IN WHICH DAMAGES SHOULD BE ALLOWED.

In *Corner vs. McIntosh*, 48 Md. Rep., 389, the Court said: "The authorities are *uniform and clear* in maintaining the principle that the natural results of a wrongful act are understood to include all damages to the plaintiff of which such act was the *efficient cause*, though in point of time the damage did not occur until some time after the act was done * * * *that the proof of actual damages may extend to all facts* which extend to and grow out of the original injury, even down to the day of the verdict; the exception to this rule excludes only such facts as not only happened since the institution of the action, but which furnish themselves *sufficient ground for a distinct suit.*"

The above was an act of trespass against a party who

directed the sheriff to levy on property of a third person. The Maryland Court cited, and we cite:

2 Greenleaf Ev., Sec. 268.

Wilcox vs. Plummer's Executors, 4 Pet., 172, 182.

Mayne on Damages, 33-35.

It being undeniable that the plaintiff sustained very large damages by the breaking up of its prosperous business, we submit the Court should be astute and ingenious to discover and apply principles of law that will give adequate redress to the plaintiff; especially so for the plain reason that, unless the defendant surety company is liable for the damages caused by the breaking up of its business, *the plaintiff has no redress at all*, save the uncertain and precarious redress of successfully prosecuting a suit for malicious prosecution of these attachments, wherein the burden would be on the plaintiff to establish to the satisfaction of a jury that the attaching creditor and its officers were actuated by malice and had no probable cause.

POINT OF LAW.

The damages from loss of profits and to credit are *actual damages, and if not recoverable in this action on the bond, they are not recoverable at all in any form of action.*

There is judicial authority for the proposition that the damage by the loss of profits of the business and to credit, cannot in some cases be recovered in a suit on the bond, because they are *a collateral consequence and too remote;* but may be recovered in an action for malicious prosecution.

It seems to us this is illogical.

There are but two classes of damages involved, *actual and punitive.* The former is to *compensate, the latter to punish.*

Damages given on the issue of malice, are *punitive damages,* awarded for punishment to deter like wrongful acts. They depend entirely *on the existence of malice* and want of probable cause, *and not on any other evidence.*

Now, we say, there *is no foundation* in logical reason for dividing *actual damages into two classes,* allowing one class in the absence of malice, and allowing another class where malice is in issue.

The element of malice *does not cause actual damages.* They are caused by *the actual issue and levy of the writs,* whether the creditor is actuated by malice or not.

Such damages are a consequence of issuing the writs; they are neither less nor greater by the absence or presence of malice, and they are *actual damages.* for which the injured party is entitled to compensation. Whether proximate or not to the wrongful act, they are actual damages, as distinguished from *vindictive damages.* or they are not damages recoverable in any action.

Take the case at bar. Profits from interruption of plaintiff's business were undoubtedly lost. Whether the attachments were the proximate cause of such loss, or a remote cause, they were actual damages. If these writs did not cause their loss, but some other intervening efficient cause did cause their loss, then neither the attaching creditor nor his surety is liable therefor *in any form of action,* but the *author* of such other intervening cause is liable.

Some Courts , in an action based on malice alone and want of probable cause, make the wrongdoer pay for actual damages not proximate to the wrong.

That is, they make the liability depend not on the fact that such damages are proximate, *but on the form of the action.* Otherwise expressed, such Courts rule that in the form of action for malicious prosecution, the wrongdoer is liable

(a) For the actual damages, proximate to the wrongful acts or writs; and

(b) For the actual damages *not proximate to the wrongful acts or writs.*

We submit that this is erroneous and that, in an action for malicious prosecution, the wrongdoer is liable only for such actual damages as are proximate to or consequential of the wrongful act, *and which can be recovered in an action* without the element of malice, or on his bond in an attachment case, *and vindictive damages.* To hold the initial wrongdoer liable to actual damages, collateral to the initial wrong, if the action is for malicious prosecution and for which he is not liable in a form of action where there is no issue of malice, seems to be wrong, incosistent and logically untenable.

To illustrate: In some jurisdictions the jury are instructed and required to state in their verdict, separately, the amount of the actual damages they find and the amount of the vindictive damages they find. Now suppose in a case for malicious prosecution against the creditor, the jury should return a verdict as follows: "Actual damages caused by the writs, $20,000; vindictive damages, $60,000, of which $40,000 *are for actual damages collateral to the writs, for loss of profits.*" Would the present state of the law authorize the Court to render a judgment on such a verdict, including the said $40,000?

If not, then in no form of action could plaintiff recover said $40,000 for loss of profits, *unless it can be recovered in an action on the bonds;* for on the theory stated in an ordinary action of trespass at common law against the attaching creditor, such damages are not recoverable.

It is submitted, the correct rule applicable to the case at bar is to hold the defendant company liable for all damages which a jury find would not have occurred if the writs had not issued, and which can be proven with reasonable certainty. Plaintiff was entitled to such an instruction to the jury.

DAMAGES FROM LOSS OF CREDIT CAUSED BY THE ATTACHMENTS.

It has already appeared that the trial judge refused to submit to the jury the question of damages sustained from the loss of credit, caused by the attachment. To such refusal the plaintiff excepted and assigned error.

See assignment of error Nos. 3 and 10 (Rec. pp. 33-37), and exceptions (Rec. pp. 120-124).

And we now assign error in this: that the Appellate Court erred in not sustaining the said assignment of error.

INJURY TO CREDIT.

These assignments raise the question whether injury to the credit of plaintiff as a *direct effect of the blow of the attachments is a distinctive element of damages for which the defendant is liable.* (Exceptions pp. 120-124.)

It is true the Court below did not necessarily rule that such injury to the credit was not a proper element of damages. The Court took that question also from the jury on the theory already discussed, that the common law suits and refusal to deliver logs after September 30th by The Atlantic Lumber Company contributed to such injury to credit, and that the jury could not separate such injury from the injury to credit caused by the attachment, and therefore took the question from the jury. (See Assignment 24, Rec. p. 44.)

It logically follows that the Court could not consistently give the instructions requested and embodied in the assignments numbered 3 and 10, which were the converse of the 24th.

The instruction requested , stated in assignment No. 3, raises the question of injury to credit as a distinct element of damages. No. 10 raises the question of injury to credit, as a consequence of taking plaintiff's assets from it as a means of doing business.

It is also true that upon the case made, by the evidence, it was not necessary, perhaps, to claim damage *for general and indefinite injury to credit, but only such injury to credit as was caused in combination with placing a lien upon all the assets of plaintiff and thereby taking them from plaintiff as a basis of credit.*

See on this distinction, *Stewart vs. Sonneborn*, 2 Woods, 603, 604.

But as in case of reversal the question may arise in another trial, we may be pardoned for placing before the Court the result of our researches on this important subject.

We have no decision by the Supreme Court of Florida upon this point.

Many cases can be cited where in an action on an attachment bond, damage to credit was not allowed. But a careful review of those cases will establish in nearly every instance the attachment was levied on real estate, either unimproved, or, if improved, not connected with an established business of defendant in attachment; or the business of such defendant was not interrupted; or, if interrupted, it was of such a character or for such a brief interval of time that damage to credit would be inappreciable and wholly speculative. That is, there was no data by which such damage could be measured.

But where defendant's established business had been interrupted for any considerable time, or where the wrong is a direct blow to credit, damages to credit have been allowed, and the question submitted to the jury.

The following are cases cited in the text books to

support the proposition that damages to credit *are generally too remote; not always too remote.*

Petit vs. Mercer, 8 B. Mon., 51 (1847).
Reidhas vs. Berger, 8 B. Mon., 160.
Holliday Bros. vs. Cohen, 34 Ark., 707.
The State to the Use of Roe vs. Thomas, 19 Mo., 613.
Offut vs. Edwards, 9 Rob. La., 90 (1844).
Campbell vs. Chamberlain, 10 Iowa, 377 (1860).
Mitchell vs. Harcourt, 62 Iowa, 349.

In *McFarland & Dupre vs. Lehman, Abraham & Co.,* 38 La. Ann., 351, the Court said:

"Considering the open and honest dealings of plaintiffs and their faithful efforts to pay their creditors at every sacrifice, communicated to all interested, and to defendants themselves, the latter's proceedings by attachments on the charge of fraudulent intent, was peculiarly injurious and insulting to plaintiffs, and substantial damages are allowed therefor."

In *Kaufman & Range vs. Armstrong,* 74 Texas, 65; s. c. 11 S. W. Rep., 1048, the Court said:

"Insolvency constitutes no ground for attachment, and *it cannot be shown in excuse or mitigation of the act of procuring an attachment.* In actions for wrongfully suing out an attachment when no malice is alleged, evidence of loss of credit is not admissible, but when the proceeding is alleged to have been malicious and exemplary damages are claimed, such evidence is generally admissible."

There the attachment was on a stock of goods.

Shinn on Attachments cites *Holliday vs. Cohen,* 34 Ark., 407, as supporting the proposition that injury to

credit is not allowable; but the same author, in his first volume, p. 343, cites the same case in support of the proposition that damages for injury to credit are allowable in case the writ is *maliciously sued out.*

If there can be any distinction between injury to credit with malice and without malice, we are unable to comprehend it, as in either case *the question of compensatory damages is entirely separate and distinct from vindictive damages;* and cites *State vs. Thomas,* 19 Mo., 613, to the same effect.

In 1 Shinn, Sec. 379, numerous cases are cited to the point that plaintiff may recover full compensation for loss of credit, breaking up of business and loss of customers, resulting from the wrongful and *malicious attachment.*

All the text writers and decisions of the Court uniformly hold that where, in a case *of malicious attachment,* injuries to credit are sustained, they may be recovered for.

1 Shinn, Sec. 379.
Lawrence vs. Hagerman, 56 Ill., 68.
75 Texas, 278, 12 S. W. Rep., 986.
Kaufman vs. Armstrong, 74 Texas, 65; s. c. 11 S. W. Rep., 1048.

The latter being a case of attachment of a merchant's goods.

Marx vs. Strauss, 93 Ala., 453; 9 Sou. Rep.,818.
Bradley vs. Borin, 53 Kan., 628; s. c. 36 Pac. Rep.
Petit vs. Mercer, 8 B. Monroe (Ky.), 51.

Which latter case is cited by Shinn as holding that without malice injury to credit cannot be compensated.

McFarland vs. Lehman, 38 La. Ann., 351.
See 2 Woods, 559, by Justice Bradley.
Wheeler vs. Hansen 37 N. E. Rep., 382 (Mass.) decided in 1894.

Shinn on Attachment, Vol. 1, Sec. 188, p. 327, says: "The value of the property or the injury to credit is not an item of recovery when the attachment *defendant has not been dispossessed.*"

Citing *Groat vs. Gillespie*, 25 Wend., 383.

In that case, attachment was levied upon a shanty and some trifling articles of personal property. The shanty was *unoccupied* at the time of the levy, and the property was in nowise interfered with other than by the making of the levy. Nothing whatever is said in the case about injury to credit, nor is the word "credit" used in the opinion.

The author also cites *Heath vs. Lemp*, 1 Cal., 410.

In that case the levy was made upon real estate alone, no personal property being taken. The defendant was not disturbed in his possession or in his business connected therewith.

There was no possible ground to claim any damages to credit.

Elder vs. Kutner, 97 Cal., 49; s. c., 32 Pac. Rep., 563, is also cited as a case where damage to credit was not allowed.

In that case the attachment was levied on unimproved land. No personal property was taken. In a suit on the attachment bond, the plaintiff claimed that between January and August of the year in which the attachment was pending, he desired to borrow quite a large sum of money; that he could not borrow it on the land under the lien of the attachment, because the attachment lien created a cloud on the title, and consequently he had to sell some mules or horses to raise the money; and thereupon he claimed damages to his credit. Obviously, in that case the damage to credit was so vague and indefinite that there was nothing by which the jury could estimate the

damages, and consequently the Court held that damage was too remote; but the Court there distinctly declared as follows:

"There is a marked distinction between cases in which personal property is attached and taken into the possession of the sheriff, and those in which real estate is taken; and when we say the damages *sought to be recovered are too remote for recovery on the bond, we must be understood as applying the remark to cases involving real estate only.*"

No business of defendant in attachment was disturbed in either of said cases.

Seattle Crockery Company vs. Haley, 6 Wash., 302, s. c. 33 Pac. Rep., 650, is also cited by the text books to support the doctrine that injury to credit is not a proper item of damages.

In that case, the writ of attachment appears to have been levied on a stock of crockery. It was dissolved within *six* days after the levy was made, on the ground that the attachment was improperly issued.

The Court below instructed the jury that they could allow damages to credit. The case was reversed on other grounds, but the Supreme Court discussed the subject of injury to credit in that case, and analogized it, whether correctly or not, to an ordinary suit on a promissory note, saying that it was injurious to the credit of any man to be sued even on a promissory note. All the Court said on the subject was purely dicta, and cannot be deemed authority.

The better expression would be, there were no data or facts upon which a jury could estimate it.

Shinn on Attachment, p. 366, cites *Pettit vs. Mercer* 8 B. Mon., 51 (Ky.), to the proposition that damages for injury to credit are recoverable, but the same author in

Section 356 cites the same case to support the proposition that damage to credit is recoverable in case the attachment is maliciously sued out; yet, obviously, there is no difference as to *compensatory damages* between a malicious attachment and one where malice is absent. In either case, it is the actual *compensatory damages* for wrong done that is recoverable; and in case of malice, *punitive damages* are in addition to the actual damages.

There can be, and are, in law but two kinds of damages: *compensatory*, for wrong done; and *punitive*, as punishment; except, of course, there are other classifications of damages, such as liquidated and unliquidated.

Sedgwick on the Measure of damages, Vol. 1, p. 183 Sec. 127, says:

"Loss of credit or custom involves the *intervention of the will of strangers, and is therefore generally remote.* Thus in the case of a wrongful attachment no compensation is allowed *for loss of credit;*" and cites:

Lowenstein vs. Monroe, 55 Iowa, 82.
Marqueze vs. Sontheimer, 59 Miss., 430.
Weeks vs. Prescott 53 Vt., 57.

To sustain that proposition.

He also cites *Pollock vs. Gannt*, 69 Ala., 373, and *MacVeagh vs. Bailey*, 29 Ill. App., 606, to the contrary.

But it is a question for the jury in a proper case to determine whether the taking away of all the assets of a corporation would not influence the will of persons not to credit those to whom, with all such assets in possession and unencumbered, they would probably have given credit.

Weeks vs. Prescott, 53 Vt., 57.

Drake on Attachment, Sec. 175, says:

"*Remote or speculative damages*, resulting from in-

juries to credit, business, character or feelings, cannot be recovered;" and cites:

Reidhar vs. Berger 8 B. Monroe, 160.
State vs. Thomas, 19 Mo., 613.
Holiday vs.s Cohen, 34 Ark., 707.
Campbell vs. Chamberlain, 10 Iowa, 337 .

To support that proposition, the author also cites some Alabama cases, but it is shown later on that damages for injury to credit *are recoverable in Alabama,* in cases where there are data and facts upon which it can be estimated.

It it thus shown that our proposition is maintained to wit: *That neither the text writers nor any Court has ever held that under no circumstances can damages for injury to credit by wrongful attachment be recovered.* They only hold that where the attachment is on real es tate, and the defendant is not disturbed in his possession or his business disturbed, the damage is too remote, there being no data from which it can be measured.

The only case where the stock of goods was levied upon, where it was held that damages for injury to credit could not be recovered, when suffered *during the pendency of the attachment* is the case of *Seattle Crockery Company vs. Haley,* supra, where the defendant was de prived of his stock of goods for only *six* days, and the Vermont case above referred to, where the possession of the goods was interrupted for only *forty-eight hours,* and the Iowa case, where injury to credit was claimed *for a time after attachment ceased.*

Notice that the Florida statute requires bond to pay all damages sustained, in consequence of *improperly issuing* the attachment (whether levied on or not). Although damage from issuing without a levy of the writ

is damage to credit, we think *the distinction is worthy of consideration.*

The following are cases where damages for injury to credit have been allowed:

Myer vs. Fagan, 34 Neb.; s. c. 51 N. W. Rep., 753, where the attachment was on a merchant's stock of goods, and where the Court held that injury to credit was a proper element of damages to be considered.

In a recent case, *Kyd vs. Cook,* 56 Neb.; 76 N. W. Rep 524, this subject is carefully reviewed as late as 1899. A stock of goods consisting of furniture and undertaking goods was attached. The Court gives its reasons at length for sustaining the rule that injury to credit is allowable In that case, the sheriff took possession of a stock of goods, removed them from the defendant's place of business, and the averment of the declaration was, "closed up the plaintiff's store and locked the same, and kept the same closed up and locked, and remained in possession thereof for a period of *ten* days."

The Court reviews the authorities cited to sustain the proposition that damages to credit were not allowable, *and holds that they are not applicable, and cites in its opinion to support the allowance for damage to credit the following cases:*

51 N. W. Rep., 753, another Nebraska case.
Lewis vs. Taylor, (Texas Civil App.), 24 S. W. Rep., 92.
Hangen vs. Hochemeister (N. Y. App.), s. c. 21 N. E. Rep., 1046.
57 N. W. Rep., 1010.

The Supreme Court of Nebraska, in the case of *Kyd vs. Cook,* supra, said:

"Another argument is that loss of credit was not a proper element of Cook's damages; that this element was too remote and speculative for consideration. This is simply to say that the wrongful destruction of or injury to a merchant's credit is one for which the law affords no redress. *We cannot subscribe to this doctrine. A man's financial standing or credit may not be 'property' within the technical meaning of that term, but it is some thing often more valuable;* and if it be wrongfully injured or destroyed by another, he may recover whatever *pecuniary damages he can prove by competent testimony, under proper pleadings, he has sustained thereby.*"

76 N. W. Rep., 526.

The case of *Hangen vs. Hochemeister,* 21 N. E. Rep., 1046 (s. c. 114 N. Y., 566), was for damages for attachment levied upon bar fixtures, gas fixtures, water fixtures, tables, chairs and other property in a saloon, and for breaking up and injuring plaintiff's business, reputation and credit. It was contended that there was no averment in the declaration under which the damages to the business and credit could be proven.

The New York Court of Appeals, 21 N. E. Rep., p. 1047, says:

"But such damages were claimed in the complaint It was alleged that the taking of the property broke up injured and destroyed the plaintiff's business, reputation and credit, by which he suffered damages."

ALABAMA CASES.

In Alabama, in the following cases injury to credit by attachment of personal property, being stocks of goods and assets of one engaged in mercantile business, has been sustained:

Flournoy vss. Howe, 70 Ala., 308; 10 Sou. Rep., 916 where it is stated how such injury to credit may be proven

Pollock vs. Gannt, 69 Ala., 373; s. c. 44 Am. Rep., 519, which was an action on an attachment bond. That case also states how damages to credit may be proven. And the late case of *Hondley vs. Chadwick,* 109 Ala., 505; s. c. 19 Sou. Rep., 845.

In this case also there was an attachment of a stock of goods, and the subject of injury to credit is again reviewed and allowed.

Birmingham Dry Goods Company vs. Finley, 26 Sou Rep., 138, is a late case in point where damages to credit was allowed.

In 1 Shinn on Attachment, pp. 343, 344, case of *Doll vs. Cooper,* 77 Tenn. (9 Lea) 576, is cited to support recovery for injury to plaintiff's credit, where he was thrown into bankruptcy by the attachment.

22 Fed. Rep., 220, where damages for injury to credit by attachment were allowed, was in the Federal Court in Tennessee, and there is no statutory law cited that influenced the Court in its conclusion.

In that case, by the effect of the attachment, the defendant was deprived of his laborers, who became frightened, and went away, *and he could not have been damaged by that if he could have had sufficient credit to employ other laborers.*

Also in 18 Fed. Rep., in the case of *Kennedy vs. Meacham,* and others, the injury to credit was considered a proper element of damages to submit to the jury, and was submitted under circumstances of the case, rendering his credit peculiarly sensitive to injury by the attachment,

and the Court, in its opinion, charging the jury, *defines what credit is, and its value to a merchant.*

In *Doll vs. Cooper,* 77 Tenn. (9Lea), 576, the Court says:

"The measure of damages for wrongful suing out of an attachment is (1) *loss by injuring, detaining, or converting the property attached; all loss by injury to plaintiff's business sand credit,* as where plaintiff is thrown into bankruptcy by the atachment; (2) vindictive damages, based on the falsity or malafides of the claim, wanton abuse of process, or express malice in suing out, levying and continuing the attachment. And these three elements of damage constitute the recovery in an action on the attachment bond as well as in the action at common law."

The above-mentioned case classes injury to credit as an actual damage.

Grimes vs. Bowerman, 92 Mich., 258; s. c. 53 N. W., 751, is a valuable and late case, where injury to credit was allowed, *as well as all losses from interruption of business.*

In *McVeagh vs. Bailey & Howford,* 29 Ill. App., 606-615, which was an action for improperly closing the plaintiff's place of business by a levy of an execution instead of levy on real estate, and the levy was quashed on motion, the Court said:

"The jury also has the evidence as to the manner and extent of damage to the goods, and of the injury to the credit of appellees. Accordingly, we see no reason to hold that the damage assessed was excessive, but we hold that the evidence appears to have warranted the damages as assessed."

In *Sonneborn vs. Stewart*, 2 Woods Rep., 603, 604, Justice Bradley, in charging the jury, expressly said:

"Damages are to be allowed to the plaintiff for the breaking up of his business and *destruction of his credit.*"

And later on: "It has been claimed that destruction of the plaintiff's credit is a distinct item of damage; *but perhaps this is to be considered as incorporated with his business and the injury thereto, as included in the damage for breaking up said business. The jury will judge whether any separate allowance should be made therefor.*"

It will thus be seen that damages were allowed for injury to credit, *even where the writ was issued by the Court as a judicial act*, and not where, as in the case at bar, the writ was issued by a ministerial officer without any judicial proceeding.

That case went to the Supreme Court of the United States and is reported in 98 U. S., 187, where it was reversed on the ground of error of the Court in its charge to the jury *upon the subject of what probable cause consisted of.*

In that case the Supreme Court and counsel for the appellant at least conceded indirectly that injury to credit was a proper element of damages, for counsel did not except to the charge of the Court below as to injury to credit, nor was it noticed in the opinion of the Court.

In I Sedgwick, Sec. 127, p. 184, after saying loss of credit or custom generally involved the intervention of the will of strangers, and is therefore generally remote, says that, on the other hand, where the cause of action is a *direct blow* to the credit or trade of defendant, the rule is otherwise; thus where the defendant who was the agent of the plaintiff in G., broke his contract to keep a cash account of five hundred pounds to meet the drafts

of plaintiff, and in consequence a draft was returned dishonored, and he was held liable for loss of trade in G., which was consequently suspended, and for loss in the general business of the plaintiff because of his impaired credit; citing two English cases.

In I Sutherland on Damages, Sec. 77, the author says:

"A banker may be liable for damagess not measured by interest for refusing to pay a check of his customer who has provided funds subject thereto. The credit of the drawer is likely to be injured by such refusal."

And the author cites the case of *Prehne vs. Royal Bank of Liverpool*, 5 L. R. Ex., 92, and other English cases, to support that proposition.

The author cites one case where the plaintiff recovered two hundred pounds for injury to his credit for not paying a check of forty-eight pounds.

The author also cites numerous American cases among others:

Schaffner vs. Ehrman, 139 Ill., 109; s. c. 28 N. E. Rep., 917, where a verdict of $450 was sustained for a *mistaken refusal* to cash checks amounting to $900.

Can it be possible that injury to credit for failure by a bank to pay a check is any more serious or appreciable than the taking by writ of attachment of all of the plaintiff's property out of its possession, and maintaining the lien of the attachment for nearly two years, and thus deprive it of all means of credit?

Certainly the notoriety of the levy of such a writ, which always goes into the newspapers, is incomparably greater than the failure of a bank to pay a check, where the refusal to pay it would certainly not be circulated by the bank, and would be known only to the holder of the check, and unless such holder reported it to the newspa

pers, the circulation of such report of such protested check would be slow and confined to those to whom the holder of the check wilfully or casually mentioned it.

In the case of *Blair vs. Kinch* 10 L. R. Ir., 234, damage to plaintiff's credit was recovered upon the following facts: Defendant had agreed not to take judgment against the plaintiff in a certain case except upon the happening of a stipulated condition, the reason being that the plaintiff was desirous of *avoiding the publication of the attachment in a certain commercial journal,* for fear that it might injure his credit. Defendant broke his contract, took judgment, and publication was made, and plaintiff brought his action therefor.

8 Am. & Eng. Enc. of Law. (2d Ed.), p. 634.

The case of *McAffee vs. Crawford,* 13 How., 447, cannot be sustained except on the theory and basis of loss of credit, which we contend for in this case. *In that case the wrongful act took away from his possession the slaves and laborers of the plaintiff, and he was allowed to prove and recover damages as follows:*

First—For the loss of cord wood which was carried away in the river by a sudden storm; and

Second—For the loss of a crop of unmatured corn which would have matured and been gathered if his slaves and laborers had not been taken from him. He still had his plantation left as a basis of credit.

Now, it is perfectly evident, or at least proper to assume that the plaintiff could have employed other laborers, if he had had the credit or means with which to do it. His losses arose from want of labor, taken from him, and certainly it was his duty to have employed other

labor, if he could. The inference is, that he had not the means to do it with, which supports our contention that no man is bound to have credit or money in bank with which he can carry on business, when all the property and assets engaged in the business and upon which he relies, are taken from him. And in that case the plaintiff still had his plantation left as a basis of credit, and without any lien of an attachment on it, as in the case at bar.

We have not found, and do not believe that there is any case where it is held that damages for injuries to credit cannot be recovered in a *malicious attachment*. The rulings of all the Courts are harmonious upon that subject, so far as we have discovered, and some of them hold that the only way to recover damages for injury to credit is by an action on the case for malicious attachment.

Some of them holding that to be the only way are cited in I Shinn, p. 343:

Holiday vs. Cohen, 34 Ark., 707.
State vs. Thomas, 19 Mo., 613.
82 Ill., 545.
52 N. W., 751, Michigan case.
Willis Brothers vs. McNatt, 75 Texas, 69.
S. C., 12 S. W. Rep., 478.

There is certainly no reason for the contention that upon a state of facts such as the bill of exceptions discloses, injury to plaintiff's credit should not be an element of damages to be submitted to the jury.

Obviously its credit was injured. Attachments for $85,000 must inevitably have injured its credit.

While we do not claim the defendant surety was liable for vindictive damages, still the fact remains that the attachments were an outrageous wrong and injustice. They would at once produce the impression among the

28th ASSIGNMENT OF ERROR.

(This assignment is at pages 48 and 49 of the Record.)

It is for the Court's remarks to the jury in the following words, to wit: "*A party has a perfect right to sue out an attachment by becoming liable to pay all damages; there is no law against it; it is not a tort; but he becomes responsible to pay all damages from the issue of the writ.*" (Exception, Record p. 134.)

Such language from the Court was calculated to produce a wrong impression on the jury, to mislead them and divert their minds from the real questions before it. It was equivalent to saying that "levying an attachment for unliquidated damages and interrupting or destroying one's business is of no consequence at all, provided a bond is given to pay damages." Such an impression was injurious to plaintiff.

Under the laws of Florida, no one has a right to an attachment by simply giving a bond. Issuing an attachment not based on ground specified in the statute, is a tort. It is not a contract; it is not a legal crime (it is a moral crime); and must be a tort, for these three classes embrace all the laws of the land.

The Florida statute provides that before an attachment can issue,the creditor must make an affidavit stating the amount of the "debt or sum demanded, and that the same is actually due.' A false affidavit would be a serious tort.

Rev. Stat., Sec. 1642.

No attachment lies under the language of that statute, based on the theory that by continuing to perform a contract of the character between these parties, profits to the amount of $75,000 would have been realized.

No such case was ever brought in Florida, at least such a case was never before the Supreme Court.

The legal profession, and judges in that state, have always construed that statute to mean that a fixed, definite and certain sum was due, or was capable of being calculated with reasonable certainty from the terms and data contained in the contract itself.

To that effect are the decisions in all the states where the statute uses like or similar words to those of the Florida statute.

The sum sworn to must be so definite or capable of being calculated with such definite certainty that the affiant can conscientiously swear that the sum stated is actually due. It is so held in the following cases:

Drake on Attachment (6th Ed.), Secs. 13 to 23.
Clark vs. Wilson, 3 Wash.,C. C. Rep., 560.
Jeffrey vs. Wooley, 5 Halst. (N. J.), 123.
Barbour vs. Robson, 3 Green (N. J.), 17.
Hazard vs. Jordan, 12 Ala., 180.
Brown vs. Hay, 1 Harr. (N. J.), 157.
Wilson vs. Lewis Cook Mfg. Co., 88 N. C.
Price vs. Cox, 83 N. C., 261.
Palmer vs. Bosher, 71 N. C., 291.
Hecksher vs. Trotter, 48 N. J.
Cheddick vs. March, 21 N. J.
Hoover vs. Hathaway, (1893) 20 D. C., 591.
25 Fed. Rep., 594.
Dun vs. Mackay, 22 Pac. Rep., 64; 65 Cal.
Warwick vs. Chase, 23 Md., 154.
5 Halst. (N. J.), 123.
Corland & Bierne vs. Cunningham, 37 Pa., 228 232.
Hugg & Bell vs. Booth & Foster, 2 Ired., 282.
5 Ired., 374.
1 Dev., 189.

6 Mackay, 221.
Hockstadder vs. Sam, 11 S. W. Rep., 408 (Tex.).
S. C., 73 Tex., 315.

This latter case, under a statute substantially like the Florida statute, held that attachment would not lie for unliquidated damages arising from breach of contract.

The Florida statute requires the debt, or sum demanded, to be sworn to *positively, not on information* and belief. Rev. Stat., Sec. 1642.

In *Clark vs. Wilson,* 3 Wash., C. C., p. 564, the Court said: "This then, is a case in which liquidated damages are demanded; in which the contract alleged as the cause of action, affords no rule for ascertaining them; in which the amount is not and cannot with propriety be averred in the affidavit, and which is, and must be, altogether uncertain until the jury have ascertained it; *for which "operation no definite rule can be presented to them."*

Justice Washington, who pronounced the opinion in this case, has been followed in all cases above cited, all of which directly apply.

In *Zinn vs. Dzialynski,* 13 Fla., 600, the Court said: "It is required, of course, that the indebtedness must be actually due, that is, *that the day of payment had arrived according to the contract,"* from which the implication is certain the writ would not lie for unliquidated damages.

The attachment for $75,000 was sued out on a claim that The Atlantic Lumber Company could have made that sum of money as profits by performing its contract to deliver logs for three years and a half, the unexpired period of the contract.

See contract, Rec. p. 90.

In the language of the opinion in 3 Wash., supra, and the California case, supra, the claim is attended with too many contingencies, uncertainties and fluctuations of the market for any man to conscientiously swear that a particular sum is due.

The Court below, by its own charge to the jury, made this a material question; and we respectfully solicit this Court to treat the question as a material one and pronounce its judgment upon it.

It certainly is a subject of supreme and transcendent importance to every citizen, and may enter into another trial.

If the charge was not pertinent and was uncalled for, still this we submit is no reason why it should not be corrected if erroneous. The charge tended to belittle the case in the estimation of the jury. . .

It could hardly fail to have an effect upon the jury prejudicial to plaintiff's interests. The jury should have been told that there was no right to an attachment for such unliquidated damages, and the defendant could have known it by proper inquiry.

We repeat, such a charge must have made an impression upon the jury that was most damaging to plaintiff. It tended to produce the impression that the case was of small importance. Especially so in connection with another charge already discussed, that the defendant as a surety was only liable to such damages as was proven by *"direct"* and *"positive"* testimony.

There was no right under the statute to the writ, and The Atlantic Lumber Company was a trespasser *ab initio* and defendant's liability was commensurate with that of The Atlantic Lumber Company and proven by the same testimony, and testimony of the same character as to certainty.

The charges and instructions given and refused established that the Court below had a most erroneous conception of the law of the case.

36th ASSIGNMENT OF ERROR.

(Record, p. 52.)

This is for excluding from the jury the testimony of Rothero, the book-keeper of the Dagnon-McLean Construction Company. (Exception, Rec. pp. 93, 94.)

One item of damages claimed in the declaration and bill of particulars was charges to plaintiff of the difference between lumber sold by plaintiff to that company which the latter bought, the delivery of which was prevented by the writs of attachment.

(Rec. pp. 22, 23.)

The witness had sworn he made entries in the books, copies of the items of the charges in the books were taken before the commissioner; witness testified they were correct as given to him by the employee having charge of that branch of the business; that the charge was made and the bill made out in the presence of plaintiff's representative.

See Testimony (pp. 91 to 94).

The Court excluded the testimony after it had been read, on the ground that the witness, *the book-keeper, did not have personal knowledge of the transaction attended to by another employee in the usual course of business.* (Rec., p. 94.)

Under the laws of Florida, such testimony was admissible.

Revised Statutes, Sec. 1120.

17 Fla., 461.

It must be observed that *the defendant* examined this witness before an officer in New York, and the *plaintiff read his testimony on the trial.* The Court excluded it on the ground that the witness himself *did not buy the lumber to supply the deficiency.*

To exclude the testimony on the ground that it was excluded, would make the books of every business concern valueless as evidence.

It is impossible that any book-keeper can know that the amount of sales or other transactions of every salesman or employee or clerk, is true. Done in the usual course of business and contemporaneously entered in the books by one whose business it was to do it, the entry is prima facie admissible and presumed to be correct.

A business of any magnitude cannot otherwise be conducted. It would be impossible to produce every salesman, or other employee, who after the lapse of time are scattered to the four quarters of the world. *The ruling of the Court was prejudicial, as it excluded proof of damages of over* $4,000.

ORIGINAL ENTRIES.

No objection to the books was made on the ground that they were not books of original entry. Such an objection was not made and could not be made.

The defendant examined the witness as its own, and itself put copies of the book in evidence. Defendant chose not to read and the plaintiff did read it to the jury; and defendant cannot now raise on appeal for the first time, any objection other than those raised in the Court below.

This rule is fundamental.

37th ASSIGNMENT OF ERROR.

This assignment is at pages (52 and 53) of the Record.

This is for striking out the portions of the declaration claiming as damages "traveling expenses of the officers and agents of the plaintiff in attending Court and preparing for the motion to dissolve the attachment." (Rec. pp. 21-25.)

Now it is a question for the jury to decide what damages are the direct and proximate results of the writs. If traveling and hotel expenses of the officers and agents of the plaintiff company were caused by the writs in an effort to prepare for, and on the trial of a motion to dissolve, then they come directly within the condition of the bond, for they are a consequence of the writs.

Striking out such parts of the declaration necessarily prohibited plaintiff from proving such damages; and of having the question submitted to the jury.

The bill of exceptions shows that the principal officers of plaintiff were on duty at their offices in New York City when the writs were levied. (Rec., pp. 99, 100.)

Such damages are legal damages to be allowed and the action of the Court was prejudicial error.

1 Shinn on Attachments, 320.
18 Fed. Rep., 311.
34 Fed. Rep., 474, 475.
38 Fed. Rep., 311-317.

Such damages come directly within the rule of the Supreme Court of Florida in the late case of *Gonzales vs. Tobacco Co.*

41 Fla. Rep., p. 471.

NEWSPAPER PUBLICATIONS.

The Court struck out that portion of the declaration averring publication of the attachment proceedings in newspapers. (Rec., pp. 21-25.)

Every one knows that in case of an attachment in such a case and for so large an amount, the newspapers will publish it, and the obligors on the bond knew it would occur in the ordinary course of events.

The greater the publicity, the more immediate and widespread is the injurious effect of the attachment upon the debtor's credit and business.

It comes within the rule of direct and proximate cause. It is not an independent efficient cause, but a cause produced naturally and in the ordinary course of things, in modern civilization where newspapers exist.

See 118 Mass., 131.

It has been pointedly ruled that the publication of notices of the attachment may be properly put in evidence for the purpose of showing injury to business and credit.

Brandt vs. Hinchinson, 68 Mich., 590.

Waples on Attachment (2d Ed.), 1012.

Manifestly if the attachment proceedings were known only in the immediate neighborhood of the debtor's business, his damage would be much less than if known throughout the large commercial cities of Baltimore, New York and Boston, where the plaintiff did business.

We submit that the Court below took a too narrow view of the consequences of such a blow as this attachment was. This narrowness of view is seen throughout its entire rulings, refusing to give instructions to and to explain to the jury the nature of the case, and their duties in the premises; and said rulings tended directly to

largely reduce plaintiff's damages below what it was entitled to recover and actually sustained. In every possible way the Court ruled so as to confine the jury to narrowest possible limits in awarding damages, whereas its rulings should have been the reverse, so as to give the jury sufficient latitude to allow liberal damages, where the evidence warranted it.

22d ASSIGNMENT OF ERROR.

This assignment is at (page 33) of the Record.

The Court refused to give plaintiff's requested instruction that it was not the duty of the stockholders in the plaintiff company after the attachments, to put fresh capital into the business in order to continue in business, and thereby diminish the damages caused by the writs. (Rec., p. 129.)

We submit such refusal was error and prejudicial.

The testimony tended to establish that Charles L. Bucki and his mother, who owned four-fifths of the stock of plaintiff company, owned considerable property. (Rec., p. 90.)

The jury on such testimony would naturally think that they ought to have come to the rescue and furnished means to buy logs with, and continue business. It may be that perhaps if *plaintiff* had other property (which was not proven or attempted to be proved), it would have been its duty to have used it to continue in business, providing that the attachment left it free as a matter of right to use its mill properties, which is doubtful. Certainly the stockholders were not obliged to do so. They owed no such duty to this defendant. The giving of the instruction would have been beneficial to plaintiff and prevented

the jury from taking an erroneous view of the evidence showing the ability of some of the stockholders to put in fresh capital.

It was error to refuse to give the instruction that the stockholders in plaintiff's company were not bound to put new capital in its business to enable them to do business and avoid the consequences of the attachment.

In *Illinois Central Railroad Company vs. Cobb*, 64 Ill., 128-142, the Court said: "It would be very unreasonable to require one who has bought and paid for an article to have the money in his pocket with which to buy a second article in case of the non-delivery of the first."

Also, *Middlekauff vs. Smith*, 1 Md., 329.

"A loss through deprivation of means for protection is proximate and is a question of fact."

Derry vs. Flitner, 118 Mass., 131.

16th ASSIGNMENT OF ERROR.

This assignment raises an important question on the subject of mitigating damages. (Rec., p.41.)
(Exception, p. 127.)

On October 9th, a Saturday, plaintiff gave a forthcoming bond and regained possession of 1,250,000 feet, on which the attachment for $9,980.80 was levied. (Rec., p. 72.)

The bond was dated on the 9th, but was not taken and approved by the sheriff until the 11th of October. (Rec., p. 73.)

On November 4th, 1897, another forthcoming bond was given in the penal sum of $100,000, and plaintiff re-

gained possession of the remainder of the 5,200,000 feet of manufactured timber levied on, and the logs in the boom not then sawed up. (Rec., pp. 70, 71.)

Our contention was, and it was sustained by the Court below, that the forthcoming bonds did not release the lien of the attachments; that plaintiff held the property attached as a bailee of the sheriff to be delivered back into the sheriff's hands when demanded to satisfy any judgment that might be recovered in the action at any time before the attachment liens ceased to be operative, which was not till June, 1899, twenty months after the levy of the attachments. Writs of error were prosecuted and supersedeas bonds given, (Rec., pp. 68, 69) and when mandates of the Court of Appeals reached the Court below, application was made to the Supreme Court for writ of certiorari. (Rec., p. 70.)

The forthcoming bonds were conditioned as required by the Statute, which is as follows:

"The property so attached may at any time be restored to the said defendant or some other person for him, upon the defendant or such other person giving bond to the officer levying such attachment, payable to the plaintiff, with two good and sufficient sureties, to be approved by such officer, in double the value of the property levied on; such value to be fixed by the officer, conditioned for the forthcoming of the property restored and to abide the final order of the Court." (Rev. Stat.,Sec. 1652.)

That plaintiff held the property as bailee, subject to the lien of the attachments, we cite:

1 Shinn on Attachment, Sec. 288.
Collins vs. Mitchell, 3 Fla., 4-11.
110 U. S., 279, 280 and p. 542.

Such is the effect of the statute.

When the property is in the hands of defendant in attachment, it is as free from the reach of other process as if it had remained in the hands of the sheriff.

Shinn on Attachment, Sec. 288.
Cordoman vs. Malone, 63 Ala., 556.
14 S. W. Rep., 958.
71 Ill., 446.
Burch vs. Watts, 37 Texas, 135.
83 Iowa, 579.
33 Pac. Rep., 563.

Under a forthcoming bond conditioned as required by the Florida Statutes, the lien of the attachments continues until dissolved on motion.

1 Shinn, Sec. 288, and cases cited.

There was no contest on this latter point in the Court below. In some states the statute is different.

Plaintiff's contention was that in contemplation of law the personal property levied on was in the hands of the sheriff in *custodia legis* up to the time the lien of the attachment ceased to be operative, whether or not the plaintiff sold it.

If plaintiff sold it, it was still liable under the forthcoming bonds and under the indemnity bond; and its liability was the same and its credit was affected to the same degree and for the same length of time, as if no bonds had ever been given. The cloud and encumbrance upon plaintiff's assets was the same as if plaintiff had given no bonds.

If no bonds had been given, the inevitable result would have been that all such timber and lumber and logs attached must have been sold as perishable or subject to deterioration, and the proceeds placed in the registry of the Court, and there held until June, 1899.

Rev. Stat. of Fla., Sec. 1655, requiring such sale.

If such sale had occurred as it inevitably must have occurred if such bonds had not been given, the property would have been sold at a sacrifice, and in that case the defendant would have been subjected to the rule of damages, to wit: The difference between the market price of such lumber sold in the usual course of business and the price it actually sold at under such circumstances, and the legal interest upon the money tied up in the registry of the Court until the litigation was ended.

The Court was therefore requested to instruct the jury to allow as damages, in the absence of other evidence, the legal interest on the market price of the personal property attached from the date of the attachment until the litigation to sustain the attachment ceased, without any mitigation of damages because of any benefit plaintiff may have derived by holding or selling said property under such bonds.

The Court refused to so instruct the jury. For this refusal error is assigned. (Rec., p. 127.)

POINT OF LAW.

It is a general rule that legal interest on the value of property detained or while the owner lost the use of it, is a proper measure of damages in the absence of other evidence.

130 U. S., 611.

It is also an established rule that a trespasser or tortfeasor cannot apportion his wrong, the plaintiff being innocent, and cannot have the damages caused by his acts mitigated or reduced because of any benefit the injured party may derive *from collateral contracts or transactions between him and third parties to which the trespasser is a stranger.*

1 Sutherland on Damages, Sec. 158, and cases cited.

Familiar instances of this are where one's property being insured is destroyed by fire from the negligence of another, and the latter is sued for damages, he cannot reduce the damages from the fact that the owner had collected its full value from the insurer.

So if one sues for personal injuries, the wrongdoer cannot mitigate the damages by reason of the fact that the injured party has collected of an accident policy for more than his whole damages sustained by the injury.

94 Fed. Rep., 746-749.
17 How., 152.
103 Mass., 224-227.

So an attaching creditor, after it is decided the attachment was wrongfully sued out, cannot mitigate the damages by proving the property attached was used to pay other creditors of the defendant in the attachment.

Hundley vs. Chadwick, 109 Ala., 575.
19 Sou. Rep., 845 (Ala.)
1 Sutherland on Damages, p. 307, bottom of page

The plaintiff in attachment when the attachment is dissolved is liable for all acts done under color of the writ treated as a trespasser exactly as if the writ had never issued.

Hundley vs. Chadwick, 109 Ala., 575.
19 Sou. Rep., 845.
1 Sedgwick on Damages, Sec. 59.
27 Mich., 234.

Therefore he cannot claim any mitigation as such trespasser because of a benefit the defendant in attachment has derived by such collateral agreements, or charitable benefits bestowed by third parties. *Even if the en-*

tire damage had been paid by third parties, defendant can have no benefit from it.

Muller vs. Eno, 14 N. Y., 605.
Clow vs. Borst, 6 Johns., 37.
Blakeley vs. White, 4 Paige, 654.

The test is: is it not the duty of the injured party to do that or those things from which he has derived a benefit or has suffered less damages than he would have sustained if he had not checked the flow of the necessary or inevitable consequences of the trespasser's injurious acts.

Defendant in attachment is under no obligation to give a forthcoming bond. He may or may not do it, at his option. He owes no such duty to the attaching creditor.

Rev. Stat. of Fla., Sec. 1652.
1 Drake on Attachment (7th Ed.), Sec. 313.
Watson vs. Kennedy, 8 La. Ann., 280.
King vs. Childs, 30 Minn., 366.

It would be incongruous and illogical for a judicial tribunal to spend its time to find out how much benefit the injured party has derived from such collateral transaction, and then bestow it as a charity upon the trespasser. Courts are not organized for such purpose.

If third parties had paid the plaintiff the entire amount of damages sustained by the attachments, the defendant could not take a penny's benefit from it.

14 N. Y., 605.
See also 53 N. Y., 152.
18 Kan., 353.

Besides there was no evidence upon which the jury could say that the plaintiff derived any pecuniary benefit from having possession of the property as bailee of the sheriff.

17th ASSIGNMENT OF ERROR.

This assignment has been covered by the discussion of the 16th Assignment. (Rec., pp. 41, 42.)

On the same principle as that discussed under the 16th Assignment, the Court was requested to instruct the jury that plaintiff was entitled to damages for loss of the use of his saw-mill properties during the time from October 11th to November 16th, when under permission of the sheriff plaintiff sawed up all the logs in the boom which had been attached, precisely the same as if the mills had not been run at all and the logs had remained in the actual custody of the sheriff during that time plaintiff held them as bailee of the sheriff.

Such request was refused.

This was error for reasons and on the authorities cited, supra.

In contemplation of law, these 3,000,000 feet of logs remained in the custody of the sheriff all that time.

If plaintiff delivered to purchasers lumber ordered before the attachments were levied, the defendant has derived the benefit of being relieved, perhaps, of damages it would have sustained by loss of profits or back charges by sub-vendees, if the lumber had remained in the actual possession of the sheriff. This was benefit enough to defendant.

AVOIDABLE CONSEQUENCES.

The doctrine of avoidable consequencess does not apply to such a case.

It does not apply in any case where the act of commission of the wrongdoer or trespasser is voluntary and deliberate, or where the act of omission is voluntary and deliberate, and is not inevitable.

In such cases the injured party may fold his hands and let the consequences of the committed or omitted deliberate act flow on until it has spent its force. There is no duty to erect a dam in such a case.

If your neighbor's cattle break out of his enclosure and get into your corn, or by his unintentional negligence your property is set on fire, or he involuntarily breaks his contract, it is your duty to take positive and affirmative action to reduce the damages. This is under the doctrine of avoidable consequence.

We repeat it does apply to the case in hand. The defendant was not entitled to any such judicial charity.

Besides, there was no evidence by which such collateral benefit could be measured. It could only be guessed at, and the issue should not have been complicated or confused or obscured by the instruction given.

In such a case if no bond is given, and the property is not subject to deterioration, it would be held until the lien of the attachment ceased.

If not, it would be sold and the proceeds remain in the registry of the Court.

If sold by the plaintiff after received under such bond, its proceeds must be held till attachment ceases.

In either event, plaintiff has derived no benefit from it, and defendant would be liable for the detention of the property.

Plaintiff under contract with the sheriff and forthcoming and indemnity bonds, ran its mill from about October 11th to November 16th, but it had to hold the product cut during that time, or its proceeds if sold, and there is no benefit received by plaintiff measurable in money which can reduce its damages for that period of time.

The doctrine of avoidable consequences does not apply to such a case.

1 Sedgwick on Damages, Sec. 204, 205.

Property, the possession of which is held by virtue of a bond given in the course of a judicial proceeding, and process issued thereon, is "held upon process of the law;" no change in title is effected.

Miller vs. White, 14 Fla., 435.

If the person so holding parts with possession, he does it at his peril.

The rule is uniformly applied to bonds given for the forthcoming of attached property.

And so, where property is released to a third person, who executes a bond under a statute which provides that the sheriff may release attached property if defendant causes to be executed a bond to the effect that he will perform the judgment, such property is held to be constructively in the sheriff's custody; and where the attachment is wrongful, defendant's damage is to be measured *by the length of time it was in such custody.*

Seiz vs. Belden, 48 Iowa, 4451.

And in debt on a bond conditioned to indemnify the obligee for all costs and damages he might sustain by the wrongful suing out of a writ of seizure from the chancery court in a suit which was dismissed for want or prosecution, plaintiff may recover, if possession of the slaves seized under the writ is not restored to him, the hire of the slaves down to the time of trial, though after the dismissal of the bill a second bill was filed for the same purpose, and a new bond given conditioned for the forthcoming of the slaves to abide the final decree.

Zeigler vs. Davis, 23 Ala., 127.

The damages recoverable for wrongfully suing out an attachment extend to the value of the uses of the property while it was withheld from defendant, and this is so notwithstanding it was replevied by a co-defendant.

Munnerlyn vs. Alexander, 38 Texas, 125.

In the light of these authorities the refusals to instruct were errors. Considering the action of the Court at the trial in its entirety, there was slight grounds left upon which the jury could award damages.

In an action on an attachment bond, where the property has been released on defendant's bond given during the pendency of the action, damages may be recovered for losses and expenses incurred in defeating the attachment, as well before as after the attachment.

State vs. O'Neill, 4 Mo. App., 221.

19th ASSIGNMENT OF ERROR.

This Assignment is in the Record at (page 42).

It is for giving an instruction containing the converse of the proposition stated in the 18th Assignment. (Rec., p. 42. Exception, p. 128.)

20th ASSIGNMENT OR ERROR.

This was for refusing an instruction stating the same principle involved in the 16th Assignment. (Rec., p. 443.)

We insist that by selling the property and holding the proceeds for the sheriff, plaintiff derived no benefit and certainly none to which defendant was entitled.

31st ASSIGNMENT OF ERROR.

PLAINTIFF TAKEN BY SURPRISE.

This Assignment is at (page 50; Exception, 114-116).

Several days were spent proving the cost, value and good condition of the plaintiff's mill plant; that the plain-

tiff company was a going and flourishing concern on October 1st, 1897; that it was in a perfectly solvent and good financial condition to continue in a profitable business; that the output of the plant had been, on an average, for four years and a half, 2,500,000 feet per month; that it had abundant orders for lumber on hand; that the net profits of the plant for several months prior to the attachment had been per month large and substantial. (Rec., p. 68.)

All this testimony was adduced to lay a foundation for damages for the time plaintiff lost the use of its mill by and in consequence of the attachments and against repeated objections by defendant, which the Court overruled.

The declaration as to damages was framed and the plaintiff tried its case on the distinct theory and belief and was encouraged in it by such rulings of the Court that the loss of the use of its mill plant would be measured by the profits made prior to the attachments, at least that the latter would furnish a guide for the determination of such losses.

After the testimony closed, the Court, on motion of the defendant, ruled that such a measure of damages would not be submitted to the jury, because the Court would not submit to the jury the question of amount of damages caused by the writs because such damages could not be separated from those caused by the other alleged contributory causes.

See motion and ruling (Rec., pp. 114-116).

This took the plaintiff by surprise, and naturally so, for reasons stated in its motion to discharge the jury and postpone the trial. (Rec., p. 117.)

The denial of this motion is assigned as error. (Rec., p. 50.)

If this judgment is not reversed on other grounds, we submit it ought to be on this ground.

It is a settled rule that after the testimony is closed in the trial of a case on a definite theory, a party cannot change his ground and claim relief on a different theory, to the prejudice of his adversary.

It would take him by surprise. *What a party cannot do, certainly a Court cannot do.*

If the evidence as to past profits and output of the mill, etc., had been excluded when offered, the plaintiff could have asked and obtained leave to amend its declaration, and claimed as damages the rental value of the mill, or interest on the money invested, or deterioration of the property, costs of repairs and of watchmen when not in use; taxes, insurance, as well as losses on lumber, the delivery of which was delayed or prevented by the attachment. The action of the Court obviously took the plaintiff by surprise and bottled it up.

The theory on which the case was tried was that plaintiff was entitled to damages for loss of the use of its mills and business while the attachments were operative, to be measured, to some extent, by past profits.

We submit, the plaintiff's motion should have been granted, both because the action of the Court was erroneous, which made such a motion necessary, and because it operated to prevent proof of such other damages; and to come prepared to prove other damages.

4th ASSIGNMENT OF ERROR.

This Assignment is in the Record (at page 34), and is for refusal to give an instruction stated in this Assignment. (See Exception, Rec., pp. 120, 121.)

We do not know whether this request was refused because the Court withdrew from the jury the question

discussed under Assignment 24, and it is therefore insisted on as a distinct proposition.

It raises the question as to the proper way of proving the financial condition of the plaintiff on October 1st, and we submit the material question was: *What was the general financial condition of plaintiff on October 1st?* to be decided upon a consideration of its assets and liabilities, and not on the opinion of an officer of its enemy, The Atlantic Lumber Company, nor of any particular bank, or its officer, hostile to plaintiff.

The proper way to prove the financial condition is pointed out in the following cases:

Trammell vs. Ramage, 97 Ala., 666.
11 Sou. Rep., 916.
Pollock vs. Ganntt, 69 Ala., 373.
S. C., 44 Am. Rep., 519, 511.

It was a question of its general credit, not of the opinion of particular individuals. The real question was whether plaintiff's condition was such that it could have continued in business if the attachment had not issued. This was dependent upon the value of its assets and general credit. It was peculiarly a question for the jury.

Grimes vs. Bowerman, 92 Mich., 258.
S. C., 53 N. W. Rep., 751.

In that case, the Court said: "It is competent to show the condition of the firm business and the assets and credits of *the firm at the time the affidavit was made*, for the purpose of showing the want of probable cause for taking out the writ, and the availability of the business for the purpose of carrying on and eventually paying the firm debts."

Where reputation or character is involved, inquiry into particular instances of bad conduct is not admissible. The law recognizes human infirmities. So business men

recognize and the law too, that the strongest business houses may be for one cause or another temporarily embarrassed and still entitled to confidence and credit soon afterward.

When the evidence showed that plaintiff had unencumbered assets to the amount of over $200,000 and but one piece of its matured paper, for about $5,300,was due, and a set-off to the greater part of that, we submit it was erroneous to allow a witness to express his individual opinion as to its financial condition, and the instruction requested should have been given.

5th ASSIGNMENT OF ERROR.

This Assignment of Error is (on page 36) of the Record.

It is for the refusal of the Court to instruct the jury that the Atlantic Lumber Company could not on October 1st bring a suit for an installment of logs that became due that day. There is no division of days—plaintiff had all that day to pay in, and was not liable to suit until the next day. Such claim was not a liability on October 1st.

Such is the rule without exception upon all contracts to pay money, save a certain class of commercial paper.

Bishop on Contracts, Sec. 1439.
18 Cal., 378.
6 Watts, etc., 179.
102 Mass., 65.
3 M. & W., 473.
89 Fed. Rep., 482.

As the defendant was attempting to attack the credit of plaintiff on October 1st, it was material for the jury to know that plaintiff was not in default to The Atlantic

Lumber Company on the day it sued out these writs, even though it had no set-off to its demands, as shown by the bill of exceptions.

No other creditor had any claim due October 1st except the National Bank of Jacksonville, the holder of the draft for $5,340.75 against which plaintiff asserted a set-off to the amount of $4,000.

And we submit this request was a reasonable one to explain to the jury that The Atlantic Lumber Company had no right to question plaintiff's credit on the day it brought suit, and would have had a favorable effect upon the minds of the jury, consequently its refusal was prejudicial.

6th ASSIGNMENT OF ERROR.

This Assignment is at (page 35) of the Record; Exception, (page 122).

It was for refusing to give an instruction to the jury on the subject of the plaintiff's financial condition. The effect of the refusal to give the instruction was prejudicial to the plaintiff. It would have shown to the jury that The Atlantic Lumber Company had no right to demand payment of the draft for $5,340.75, the only piece of matured paper of the plaintiff's outstanding which *that company did not hold.* It required the jury to consider a set-off of $4,000 to that draft in the hands of the bank. It also explained to the jury that the indebtedness of The Atlantic Lumber Company to the bank *should not be confounded with plaintiff's indebtedness.*

It is submitted that instruction was proper and should have been given.

Where a large amount of testimony is turned in upon the jury like crude stuff into a hopper, we think it essential to a fair and just and impartial trial that the Court

should explain to the jury the bearing and applicability of the evidence to material issues.

Certain it is that the jury should have clearly understood that the debts of The Atlantic Lumber Company to the bank could not be applied to affect the credit of the plaintiff, for there was no pretense that plaintiff was in any way liable for such debts.

Taking the draft for $5,340.75 for balance due for logs August 15th, including an advance of $2,000, and negotiating it, precluded The Atlantic Lumber Company or defendant from claiming that plaintiff was in default for any payment for logs due on the date of such draft.

64 Fed. Rep., 569-574.

25th ASSIGNMENT OF ERROR.

This was for the refusal of the Court to give to the jury an instruction stated in that Assignment. (Rec. p. 47. Exception, 131..)

The bill of exceptions shows that owing to the enormous accumulation of lumber on plaintiff's wharves in the summer of 1897, because the purchaser could not or did not obtain vessels to take it away and pay for it, a few of plaintiff's drafts went to protest; but were paid a few days after protest. This occurred prior to August 15th, 1897. The Court was asked to instruct the jury that the fact of such protest and payment at that time was immaterial on the subject of the financial condition of plaintiff on October 1st, provided the jury found plaintiff had the means of continuing in business on October 1st, if the attachments had not been levied.

We think it was a proper charge.

The request was in effect to exclude the testimony as to protest of such drafts as too insignificant and remote

to affect plaintiff's condition on October 1st, when vessels commenced to arrive and proceeds of lumber commenced to be received.

See Testimony (Rec., pp. 100, 101).

The fact that the payment of such drafts was for a day or two delayed, all having been paid from six to ten weeks before October 1st, the day on which to apply the test of its financial condition, was too remote. Such evidence should have been wholly excluded. The least the Court could do was to instruct the jury that it was immaterial of the issue presented.

The point in issue was plaintiff's financial condition on October 1st. Withholding the requested instruction left the jury at liberty to consider that its financial condition in June and July was a material fact. As it was a conceded fact that all evidence of its impaired financial condition in June and July consisted of the non-payment of these drafts for a few days after maturity, and that they were all paid before August 15th; that the failure to pay them promptly was due to the fact that purchasers of lumber could not get ships to move the lumber, we submit such evidence was immaterial and irrelevant to prove the issue of its financial condition on October 1st.

The reason why such evidence is not proper is that it "tends to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them."

1 Greenleaf on Ev. Sec. 52.

There was no evidence tending to establish plaintiff's inability to meet its obligations, even temporarily, continued from June or July down to October 1st. The evidence sought to be declared immaterial to the point in issue was too remote, and of isolated and collateral facts.

There was no pretense that on October 1st there was more than the one piece of plaintiff's commercial paper outstanding. It certainly was able to pay that on October 1st. It had from sixty to eighty thousand dollars worth of lumber on its wharves and not a lien for a dollar on it. Plaintiff did not pay it because it asserted a set-off of $4,000 against it.

So plaintiff was able to pay the claim of the Atlantic Lumber Company for balance of logs delivered, but it asserted a set-off against such claim, and the above were the only claims shown to be due.

Ability to pay should not be confounded with a refusal to pay.

The evidence objected to had no logical tendency to prove plaintiff's financial condition on October 1st.

It tended to mislead and prejudice the jurors when plaintiff did not deserve to be prejudiced by such testimony.

The question only becomes of prime importance in case of another trial for the reason that the refusal to submit to the jury the main question stated in the 24th assignment eviscerated the plaintiff's case.

This was for refusing an instruction contained in the assignment, found at (page 47) of the Record; Exception (page 132).

The request was to submit to the jury whether the sale of plaintiff's mill properties in February, 1899, (while the lien of the attachment was still operative) upon an execution on a judgment obtained upon an *obligation incurred after the attachments were levied was caused by the attachments*. If it was, damages should not be reduced because of such sale.

(See testimony, Rec. p. 85-86.)

It may be that this was refused because of the action of Court complained of in the 24th assignment, by which the Court took the whole subject of damages after October 11th, 1897, from the jury so far as the loss of the use of its mills was the cause.

If plaintiff incurred the debt on which the judgment was had in a reasonable effort to *continue in business after the attachments, but was unable to do so,* owing to the lien of the attachments and the continuance thereof by writs of error, then the sale was caused by the attachments.

It was one of the consequences of the attachment, which defendant covenanted to pay. It certainly was a proper question for the jury.

In *Grimes vs. Bowerman*, 92 Mich., 258; s. c. 53 N. W.Rep. 751, the same question was presented. The Court said: *"It was competent for plaintiff to show the subsequent attachments and the foreclosure of the chattel mortgage, it being left for the jury to say whether such acts resulted from defendant's suing out his attachment."*

It is a question of cause and effect which is exclusively for the jury.

27th Fla. 116.

Had plaintiff made no effort to go on in its business. then it would have been urged in defense that it ought to have made an effort.

Having made the effort, and failed because of such attachment liens then plaintiff's damages caused thereby should not be reduced. (Rec. p. 82.)

For these reasons the assignment is insisted on.

The testimony established that a prosperous business of considerable magnitude was entirely destroyed by these

attachments and by the persistent efforts to continue them upon plaintiff's property until it was ruined.

Defendant's covenant is to pay "all damages in consequence of said attachments." Up to date it has not done so, and there has been a miscarriage of justice by taking questions of material facts from the jury upon which there was ample evidence.

34th ASSIGNMENT OF ERROR.

This Assignment is at page (51 of the Record).

It is for refusing to exclude the testimony of Bion Barnett, Cashier of a Bank. Upon an assumed statement of the amount of assets and liabilities of plaintiff he was allowed to give his opinion as an expert as to plaintiff's financial standing on October 1st, 1897. (Rec. p. 104.)

This was not a subject of expert testimony. The jury were as competent to judge of that as he was. It was not a question of "science, art, skill or trade." It was a matter of common knowledge.

1 Greenleaf on Ev. Sec. 440.
Ferguson vs. Hubbell, 97 N. Y. 511;
Wyckles vs. Brooklen, 118 N. Y. 429;
94 U. S. 469;
113 U. S. 645;

The testimony of this witness was obnoxious because his bank had a controversy with plaintiff as to its liability for the full amount of the draft for $5,340.75, and because this Bank was a large creditor of the Atlantic Lumber Company and as the latter Company was liable for judgment against the defendant, its surety, such judgment would diminish its means of paying the Bank.

(See record p. 85, last part.)

The Atlantic Lumber Company had no credit with any other Bank. Letter of Meigs, (Rec. p. 98.) The great anxiety of The Atlantic Lumber Company was not in respect to the credit of the plaintiff but in regard to its own credit.

We submit that the serveral errors assigned, were prejudicial to plaintiff, and that it has not had a fair trial of its case upon the evidence and law applicable thereto.

COUNSEL FEES INCURRED FOR SERVICES RENDERED IN OBTAINING A DISSOLUTION OF THE ATTACHMENTS ON MOTIONS MADE AND DECIDED BEFORE TRIAL OF THE ACTIONS ON THE MERITS.

It appears in the Record that in a special verdict the jury found the amount of such fees to be $7,500, and the Circuit Court refused to include that sum in its judgment. To such refusal plaintiff excepted and assigned error No. 35. (Rec., p. 52.)

The Appellate Court sustained this Assignment and ordered the judgment to be amended so as to include the said sum of $7,500. (Rec., p. 119.)

The basis of the defendant company's petition for the writ of certiorari, is that the Court of Appeals erred in thus allowing such counsel fees; and said petitioner assigns this as error in this Court.

The plaintiff, to support its contention that such counsel fees are under the laws of Florida proper elements of damages, within the condition of the bonds, submits the following authorities and argument:

The opinion of the Court of Appeals in the case:

48 C. C. A., 436.

S. C., 109 Fed. Rep., 393.

This Court, at its last term, held that a suit on an injunction bond given in an equity suit in the Federal Court, contained a Federal element, and that as to attorney's fees as damages on dissolution, the prior decision of this Court must control.

Tulluck vs. Mulvane, 184 U. S., 497.

But in that case the *converse of the proposition thus declared was also maintained*, to wit: that when the bond was given under the laws of the state, *the local law controlled*. The proposition being true, the converse is true.

There is a local law that governs this case, and it was so held by the Court of Appeals.

48 C. C. A., 436, 445.

In *Wittich vs. O'Neil*, 22 Fla., 592, *decided in* 1886, *the local law was declared.*

Therefore, *eleven years* before these attachment bonds were executed, counsel fees for obtaining a dissolution of an injunction were ruled to be a proper element of damages in a suit on the bond. The condition of the injunction bond in that case was: "Shall pay to the said W. L. Wittich all damages he *may sustain* by the issuing of said injunction in case the injunction be hereafter dissolved."

Id., p. 595, at bottom of page.

The substance of the condition of said injunction bond and of these attachment bonds are in legal effect substantially identical, except that the attachment bonds contain a liability for "all costs" which the injunction bond did not.

And the Supreme Court of Florida, in 1855, held that the word "costs" *included attorney's fees as between client and attorney*, and employed the words "fees" or "costs"

Carter vs. Bennett, 6 Fla., 258, 259, 260.

In *Gonzales vs. DeFuniak Tobacco Co.*, 41 Fla., 471, 477, *which was a suit upon an attachment bond* the Florida Court again ruled that attorney's fees were a proper element of damages under the condition of the bond, without specifically stating whether or not they were included in the words "all costs" "or damages."

And there is a stronger reason for allowing such fees on an attachment than on an injunction bond. This is pointed out in *Territory ex rel. Lyser vs. Rindscoff*, 4 N. M., 363, 20th Pac., 180, by the Supreme Court of New Mexico, which held that the case of *Oelrichs vs. Spain*, 15 Wall., 211, *had no application to a suit on an attachment* bond, in a well considered opinion.

MERITS AND SERVICES ON INTERLOCUTORY MOTIONS DISTINGUISHED.

The distinction between services *in defense of the suit* on the merits and on such motions is obvious.

Any party has a right in good faith to sue at law or equity, without incurring any liability, except ordinary costs; but injunctions or attachments are only obtainable *on certain conditions imposed by local law.*

Judge Shelby, in his dissenting opinion, fails to observe such distinction in his citations of authorities

48 C. C. A., 449.

He cites:

Ascambel vs. Wiseman, 3 Dall.306.
Day vs. Woodworth 13 How., 363.
Ins. Co. vs. Conard, Bald., 138.
S. C., Fed. cases No. 10,647.
The Nuestra Lenora de Regla, 17 Wall., 29.

In neither of those cases was there any suit on an *injunction or attachment bond. The question arose in*

the suit on trial, and by the law of the land, *everywhere*, where the common law prevails, attorney's fees are not allowed for services of attorney in the suit on trial. It must be for some *prior litigation.*

He cites *Bing Gee vs. Ah Jim*, 7 Fed., 811, a suit on an attachment bond where claim for attorney's fees was striken out of the declaration as immaterial. *Why?* Because later on in the opinion of the Court it will be found that such fees were regulated by statute. It was a case of *first impression under local statutes*, and the question had not been decided by the state Court.

35 Fed., 395, was cited by the learned judge. That case arose on a *garnishment proceeding and the local law on the subject, as* declared by the state Court, was followed.

The case of *Sonneborn vs. Stewart*, 2 Woods, 599, is cited, where Justice Bradley ruled that counsel fees for obtaining a *vacation of an adjudication of bankruptcy* were allowable as damages in a suit for malicious suing out bankrupt proceedings. Judge Shelby seems to be of the opinion that the Supreme Court reversed that ruling on a writ of error in *Stewart vs. Sonneborn*, 98 U. S., 197. We do not so understand the decision in the latter case. On the contrary, we think *it is clear that no error was assigned on the ruling of the Court below on the charge of the Court to the jury that attorney's fees were allowable for obtaining a vacation of bankrupt proceedings.*

In the Court below, in that case, *the defendant requested the Court to instruct the jury that they could not allow counsel fees for prosecuting "this suit"*—that is the malicious attachment suit. Error was assigned for refusing to give that instruction. This is established as follows:

Near the close of Mr. Phillips' brief for the defendant in error, he said: "The Court, having limited counsel fees to those incurred *in resisting the proceedings in bankruptcy*, was not required to instruct that they should *not be allowed in another and different proceeding.*"

Id., p. 191.

On page 197 (98 U.S.) this Court said: "The Court was *asked to charge* that the jury, if they found for the plaintiff *could not, in estimating the damages, consider* the *fees of counsel in prosecuting the case.*"

Again, on same page, this Court said: "The fees of counsel *in prosecuting this case were no part of the consequences* naturally resulting from the action of defendants in suing out the decree and warrant *of bankruptcy.* * * * That such fees are not recoverable and why they are not was clearly shown in *Good vs. Maylin*, 8 Pa. St. 51; *Alexander vs. Herr*, 11 Id., 537; *Stopp vs. Smith*, 71 Id., 285; *Hicks vs. Foster*, 13 Barb. (N. Y.), 424. The rule asserted in those cases (local law) we think, is correct, and should *have been given to the jury in the present case.* The defendants were the more injured by the *refusal to give it*, because evidence was given of the *cost of prosecuting the suit*, calculated immensely to influence the damages—evidence which should not have been offered or received."

Id., 197.

See also close of Justice Bradley's opinion, p. 202.

It is thus clearly established that the Supreme Court said it was error *to refuse to give an instruction requested by defendant* that attorney's fees were not allowable for *services in the case then before the Court* for malicious prosecution, begun in the Circuit Court for the Middle District of Alabama. It is plain that no error was as-

signed on the charge of the Circuit Court allowing counsel fees for services in the District Court in *obtaining the setting aside* of the adjudication in bankruptcy.

Judge Shelby failed to observe the distinction above pointed out, and failed to see that the case was reversed on the *sole grounds* of taking from the jury the question of probable cause, and the malice; and for refusing *to give an instruction that counsel fees were not allowable for* services of plaintiff's attorneys *in prosecuting the action for malicious prosecution.*

The distinction is a broad one between counsel fees for resisting bankrupt proceedings in the *District Court*, and those for prosecuting an action *in the Circuit Court*, for malicious prosecution of such bankrupt proceedings *in the District Court.*

The case of *Oelrichs vs. Spain*, 15 Wall., 211, was cited. That was an equity case that *arose* in the District of Columbia; there never was any motion made to dissolve the injunction in that case, and, as held by the Federal Supreme Court of New Mexico, has no application to the case at bar. It did not arise under any local law.

Territory ex rel. Lyser vs. Rindscoff, supra.

THE DECISION OF GONZALES VS. TOBACCO CO., 41 FLA., 471, A DICTUM.

This was decreed by Judge Shelby. The Court of Appeals held otherwise.

Judge Shelby also held that if not a dictum, the case was *decided after the attachment bonds were given*, and for that reason not binding on the Federal Court. The Court held it was bound, or, at least would follow, the decision of the local Court on a question of damages on a contract under a state statute.

RIGHT ACCRUED BEFORE ANY STATE DECISION.

Judge Shelby held that the defendant surety company *had acquired the right to the independent judgment of the Federal Court,* as to the measure of *its* liability under the condition of its statutory bonds, because such bonds were executed before there had been any state decision on the subject, and cites 107 U. S., p. 20.

The learned judge seemed to regard the case of *Wittich vs. O'Neil,* 22 Fla., supra, and *Bennett vs. Carter,* 6th Fla., though decided many years before October 1st, 1897, *the date of the attachment bonds,* as of no importance. Whereas the case of *Wittich vs. O'Neil,* though on an injunction bond, *is as controlling as if it had been on an attachment bond;* and the Florida Court cites that case as authority to control itself in the case on an attachment bond of *Gonzales vs. Tobacco Co.,* 41 Fla., 477.

Besides, in *Burgess vs. Seligman,* 107 U. S., 20, the Supreme Court of the state *made subsequently a contrary recision.* And this Court said: "But even in such cases for the sake of harmony and to avoid confusion, the Courts of the United States *will lean towards an agreement of views with the State Courts,* if the case seems to them balanced with doubts."

Id., 21.

For much greater reason will the Federal Courts *lean to the views* of the State Courts, when the latter have decided the question *before* the Federal Courts have, even though under circumstances when the state decision is not absolutely obligatory on the Federal Courts.

In *Bartholomew vs. City of Austin,* 29 C. C. A., 568, the Federal Court had decided the question *before* any decision of the state Court.

Therefore, neither that case nor *Burgess vs. Seligman* 107 U. S., has any special application to the point in hand.

POINT OF LAW.

These bonds were executed on the 1st day of October, 1897.

Now, *what rights* did the obligor acquire when it executed these?

(a) Certainly not the right to a decision of a Federal Court that it was *not liable* to the counsel fees in question; for the Supreme Court of the United States *had never decided* that a surety on an attachment bond was not liable.

(b) When the bond was executed, did the obligor then *acquire a right to have a Federal Court determine* the measure of its liability? If so, how?

The bond was given in conformity to a local statute. It was given in an action *in the State Court* (Removed to the Federal.)

Plainly there was no right to assume the action would be removed to a Federal Court; but as it involved no Federal question, the obligor could not have contemplated that *it's obligation would ever be determined by a Federal Court.* It was beyond *its* power to secure a determination by a Federal Court. Therefore, it never could have contemplated that it would be exempt from paying such counsel fees under the rule in the Federal Court that on an *injunction bond given in a Federal Court* the surety was not liable to such damages.

This being undeniably so, it necessarily must have contemplated that the measure of its liability would be such as the State Court *had already, or might thereafter, determine.*

The State Court had then *already* determined that on an injunction bond, with a condition in legal effect not so broad as in these attachment bonds, it was liable to such damages; and, therefore, so far as the obligor *contemplated* its liability at all, it must have contemplated a liability *declared* by such prior decision in *Wittich vs. O'Neil*, 22 Fla., supra, made eleven years before. If it took the advice of counsel, it was unquestionably so advised, and therefore cannot complain. And undoubtedly it would have been advised that its liability in any event would be decided by the State Courts, as it has since been decided in an action on an attachment bond, with exactly the same condition. (41 Fla., 471.)

The fact of the mere incident that the suits were removed to the Federal Court cannot diminish the force of the above contentions, *so far as this surety ever contemplated* by what Court its liability would be determined.

(c) The result is, that the obligor, when the case was removed to the Federal Court, must then have *contemplated* that the Federal Court, *if not bound by a prior state decision*, would construe the bond and determine the liability in harmony with such prior decisions of the State Court. ....

Burgess vs. Seligman, 107 U. S., 21-34

Therefore, considered as an open question, the decision of a majority of the judges of the Court of Appeals was unquestionably sound.

Plaintiff, therefore, relies upon the case as decided by the Appellate Court, as conclusive. And we rely upon the *very general rule* prevailing in most of the states, that counsel fees are a proper element of damages.

The cases are cited in I Sedgwick on Damages, Section 237.

Counsel fees were held to be an element of damages in the following Federal cases:

Territory ex rel. Lyser vs. Rindscoff, 4 N. M., 363.
S. C. 20 Pac. Rep., 180.
34 Fed., 474-476.
38 Fed., 311-317, by Justice Brewer.
2 Woods, 603, by Justice Bradley.
12 Fed., 265, by Judge Pardee.
147 U.S., 103-111, where allowance of counsel fees in prior litigation was approved.
7 Biss., 99-101.

In 18 Fed., 312, and 35 Fed., 315, they were not allowed by the local state decisions.

In every case in a Federal Court where the question has arisen, the local law has been followed.

So far as any question of public policy is involved, each state declares its own upon all questions; and when declared, it is conclusive on the Federal Courts; especially so on a rule of damages arising out of contract.

Hartford Fire Insurance Co. vs. Chicago, etc.Co., 175 U. S., 91.

That case precludes futher argument.

Congress, by statute, lately declared that upon a bond in involuntary bankruptcy proceedings, the obligors *shall be liable for counsel fees for services in obtaining a vacation of an adjudication in bankruptcy.*

See Bankrupt Act, Sec. 3, Letter E.

Such provisions ought to settle the question as to Federal public policy on this subject of attorney's fees being a proper element of damages in such cases of improper seizure of property.

The Court in the case *In re Abraham*, 93 Fed. Rep., 768, held that a party who had obtained in a case of bank-

ruptcy *a judicial order*, under which the property of a citizen was seized, should on the vacation of such order, pay all damages, including counsel fees caused thereby. In that case *it was a judicial order, obtained after notice and a hearing.* In the case at bar, the writ of attachment is issued by a ministerial officer, the clerk of the Court acting *ex parte.*

21 Fla., 189.

In 120 U. S., 210, *et seq.*, the Supreme Court declared that in a suit on an injunction bond, in a State Court of law, given in a *Federal bankruptcy case, the measure and rule of damages was according to the laws of Louisiana.*

In 170 U. S., 472-473, the Supreme Court held that the measure of damages in an action of trover was controlled by the decisions of the State of South Carolina, and that Sections 621 and 914 of the Revised Statutes of the United States made such decisions obligatory on the Federal Courts.

The case at bar was commenced in the State Court. It would be an intolerable anomaly that one measure of damages should be applied in the State Court and another in a Federal Court in that state, in a suit upon a local statutory contract. Especially when dependent on the contingency of right of removal.

In *Burgess vs. Seligman*, 107 U. S., 33-34, the Supreme Court declared no such anomaly can exist, and that Section 621 of the Revised Statutes was passed to prevent it.

BENEFIT TO SURETY.

If the attachment is not dissolved and the property attached is perishable, or subject to deterioration, the state law requires it to be sold, and the proceeds paid into the registry of the Court to abide judgment on the merits. (Rev. Stat. of Fla., Sec. 1665.)

It would be a rare case where the property would not be sold at a sacrifice.

In this case at bar, in the suit in which the attachment for $75,000, which caused nearly all the damages, was issued, judgment on the merits was in favor of defendant in attachment.

If the attachment had not been dissolved, and property sold at a sacrifice (and so large an amount probably would have been), the damage thereby caused would, doubtless, have been greater than the amount allowed by the jury for counsel fees.

In this view of the case, which is a reasonable one, the damages would have been larger than the jury allowed for obtaining the dissolution of the attachment. Consequently defendant has been actually benefitted by the service of obtaining a dissolution of the attachment.

Our conclusions contended for on this branch of the case are:

1. That the question is one under local laws, and the Federal Courts are bound by the state decisions.

2. That it is a question of local law, and if the Federal Courts are not bound by state decisions, no Federal element is involved; and good reasons appear why the Federal Courts should decide in harmony with such state decisions.

3. That the question is conclusively settled by *Tulluck vs. Mulvane*, 184 U. S., supra, where *the converse of the proposition here involved was maintained.*

OTHER ASSIGNMENTS OF ERROR BY THE DEFENDANT SURETY COMPANY IN THE COURT OF APPEALS.

That part of the Record in this Court (pp.143-212) which embraces the Record in the Court of Appeals, removed there by the writ of error sued on by the Fidelity & Deposit Company, contains 39 assignments of error by the said company.

They were based on exceptions to rulings of the trial judge. (Nos. 1 to 36, inclusive.)

It will be observed that no one of such exceptions, save the 15th and 16th, *state any grounds of exception whatever to the rulings* of the trial judge, and under the rules of Court, the plaintiff in error in said writ was not entitled to have such assignments considered; and they were not considered.

Said assignment No. 15 was for refusing *to admit evidence* to show what use was made of the proceeds of the lumber sold after possession was acquired under forthcoming bonds. That did not concern the surety company. If such lumber was sold, it was at plaintiff's peril, for it was the bailee of the sheriff; and the surety company could derive no benefit from such sale, no matter what use was made of the proceeds.

See authorities cited on p..... of this brief.

Said assignment No. 16 was for refusing to exclude evidence that salaried employees were idle by reason of the attachments.

This has already been discussed.

There is no merit in any of the said 39 assignments, and the most of the questions raised thereon, even if so

made as entitles them to consideration, have been discussed in a previous part of this brief.

From reading said 39 assignments of error, it is apparent that the views of counsel for the surety company are, that the latter is liable to no damages whatever as a consequence of these writs, *except taxable costs caused by such writs.*

AMOUNT OF THE VERDICT AND JUDGMENT AS INCREASED BY THE APPELLATE COURT.

We contend there was no reversible error to the prejudice of the surety company.

1. Both reason and authority sustain the allowance of counsel fees.

2. That even though some of the errors by the surety company assigned on the rulings of the trial judge were sustained, they were too inappreciably injurious to justify a reversal.

The verdict for $10,800 could not reasonably be reduced at another trial. The legal interest at eight per cent., under the laws of Florida (Rev. Stat., Sec. 2320), on $80,000 worth of personal property for the twenty months it was detained, amounts,without rests, to nearly that sum, and making a rest at the end of the twenty months, say June 1st, 1899, to the date of the verdict, February 2d, 1900, it would amount to more than the verdict by several hundred dollars.

Substantial justice having been done, so far as the surety company is concerned, the judgment would not be reversed at its instance, when it is apparent it could not justly be less as a result of another trial.

Therefore, unless reversed at the instance of the plaintiff on its assignments, the judgment should be affirmed.

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